Supreme Court of the United States.

No. 7
(ORIGINAL.)

EX PARTE ORANGE FULLER, ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, AND PETITION FOR WRIT OF MANDAMUS.

RICHARD D. SHEPARD,
HARRISON O. SHEPARD,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

Ex Parte ORANGE FULLER, ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, Petitioner. | No. ..... ORIGINAL.

Now comes Orange Fuller, assignee of Manny G. Butler and Robert E. Butler, composing the firm of Butler Brothers, petitioner, in the above entitled cause, by Richard B. Shepard and Harrison O. Shepard, his attorneys, and moves the court for leave to file his application for a writ of mandamus against the Honorable W. H. H. Clayton, as judge of the United States Court in the Indian Territory, Central District, to compel said judge to execute the mandate of this honorable court, issued in cause numbered 16,236, wherein The Missouri, Kansas and Texas Railway Company was plaintiff in error, and your petitioner was defendant in error, and to set aside an order made on the fifteenth day of January, A. D. 1900, granting a new trial in said cause in the said United States Court in the Indian Territory, Central District.

RICHARD B. SHEPARD,
HARRISON O. SHEPARD,
Attorneys for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES.

Ex parte ORANGE FULLER, ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, Petitioner. | No. ..... ORIGINAL.

To the Honorable, the Chief Justice and Associated Justices of the Supreme Court of the United States:

Comes now Orange Fuller, assignee of Manny G. Butler and Robert E. Butler, composing the firm of Butler Brothers, a citizen of the United States, and residing in the Indian Territory, and gives this honorable court to understand and be informed:

That Whereas, on the twenty-third day of January, A. D. 1892, your petitioner filed in the office of the clerk of the United States Court in the Indian Territory at Muscogee, his complaint at law duly verified, against The Missouri, Kansas and Texas Railway Company, to recover the sum of seventeen thousand and seventy-nine and 34-100 ($17,079.34) dollars as damages, and caused summons to issue thereon, which was duly served, to which complaint at law defendant answered.

And Whereas, about the first day of May, A. D. 1894, the venue in said cause was legally and properly changed from the First Judicial Division (now the Northern District), to the Second Judicial Division (now the Central District), of the Indian Territory.

And Whereas, on the second day of February, A. D. 1895, upon trial and verdict by jury, judgment was entered in favor of your petitioner, and against the Missouri, Kansas and Texas Railway Company, for the sum of eight thousand five hundred ($8,500.00) dollars.

And Whereas, on the first day of March, A. D. 1895, said The Missouri, Kansas and Texas Railway Company filed its petition for writ of error and superseadeas bond, which were respectively allowed and approved, and the said cause duly filed and docketed in the office of the United States Circuit Court of Appeals for the Eighth Circuit, on the third day of April, A. D. 1895, on appeal from said United States Court in the Indian Territory, Second Judicial Division (now Central District).

And Whereas, on the thirtieth day of December, A. D. 1895, an opinion of said United States Court of Appeals was filed in said cause, affirming the judgment of the said United States Court in the Indian Territory and judgment accordingly entered.

And Whereas, on the fifth day of March, A. D. 1896, said The Missouri, Kansas and Texas Railway Company filed in the office of said United States Circuit Court of Appeals, its assign-

ments of error, petition for writ of error, superseadeas bond and writ of error, said petition for writ of error, and supersedeas bond having been respectively duly allowed and approved, and said cause was duly filed and docketed and numbered 16,236 in this honorable court on the 20th day of March, A. D. 1896.

And Whereas, on the third day of January, A. D. 1898, the said judgment of the United States Circuit Court of Appeals for the Eighth Circuit and the United States Court in the Indian Territory, Second Judicial Division (now Central District), was affirmed by this honorable court and the cause remanded to the United States Court in the Indian Territory.

And Whereas, in accordance with said judgment, on or about the third day of March, A. D. 1898, there was issued out of the office of the clerk of this honorable court its mandate, which was on the twenty-second day of July, A. D. 1898, duly filed and spread upon the records of the United States Court in the Indian Territory, Central District.

And Whereas, on the twentieth day of April, A. D. 1896, and subsequent to the filing and docketing of said cause, and while said cause was pending in the Supreme Court of the United States on appeal, as aforesaid alleged, said The Missouri, Kansas and Texas Railway Company filed in the United States Court in the Indian Territory, Central District, its petition for a new trial or rehearing for newly discovered evidence; and that summons was issued against your petitioner to answer on the first day of the next term of said court, on to-wit: about the first day of September, A. D. 1896. On that date your petitioner objected in writing to the consideration of said petition, on the grounds that said court was without jurisdiction or authority in the premises; that the issues sought to be made by said evidence were not properly before it, and that the proceedings were and had been irregular and not according to law. The said The Missouri, Kansas and Texas Railway Company afterwards filed amendments to its said petition, on the following dates, to-wit:

May 7, 1897. First amended petition for new trial filed.
August 13, 1897. Second amended petition for new trial filed.
September 21, 1897. Third amended petition for new trial filed.
May 20, 1898. Fourth amended petition for new trial filed.
June 27, 1898. Amendment to fourth amended petition for new trial filed.
August 30, 1898. Second amendment to fourth amended petition for new trial filed,

to which several amended petitions your petitioner filed objections in writing to the consideration of the same, as aforesaid.

And Whereas, the Honorable W. H. H. Clayton, as judge of the said United States Court in the Indian Territory, Central

which leave of this honorable court first had and obtained,

District, after a hearing upon said petition, amendments thereto and answer, on the fifteenth day of January, A. D. 1900, granted said petition and ordered a new trial in said cause, and accordingly entered the order of record in said court. That the Honorable W. H. H. Clayton was, at the time of the making of the order complained of, and now is the duly appointed, qualified and acting judge of said United States Court in the Indian Territory, Central District, aforesaid.

And Whereas, the said W. H. H. Clayton, judge as aforesaid, is preparing to and will proceed to re-hear said cause on its merits, under the order so made, granting a new trial, unless this honorable court commands him to execute the mandate of this honorable court, and set aside the order complained of made by him after receiving the mandate and inconsistent therewith.

And your petitioner further states that he is entirely without remedy in the premises, unless it is afforded by the interposition of this honorable court.

Wherefore, your petitioner prays that a writ of mandamus may be issued and directed to the Honorable W. H. H. Clayton, as judge of the said United States Court in the Indian Territory, Central District, commanding him to execute the mandate of this honorable court, and to set aside the order granting a new trial made on the fifteenth day of January, A. D. 1900, in said cause.

And as in duty bound your petitioner will ever pray.

ORANGE FULLER,
Petitioner.

RICHARD B. SHEPARD,
HARRISON O. SHEPARD,
Attorneys for Petitioner.

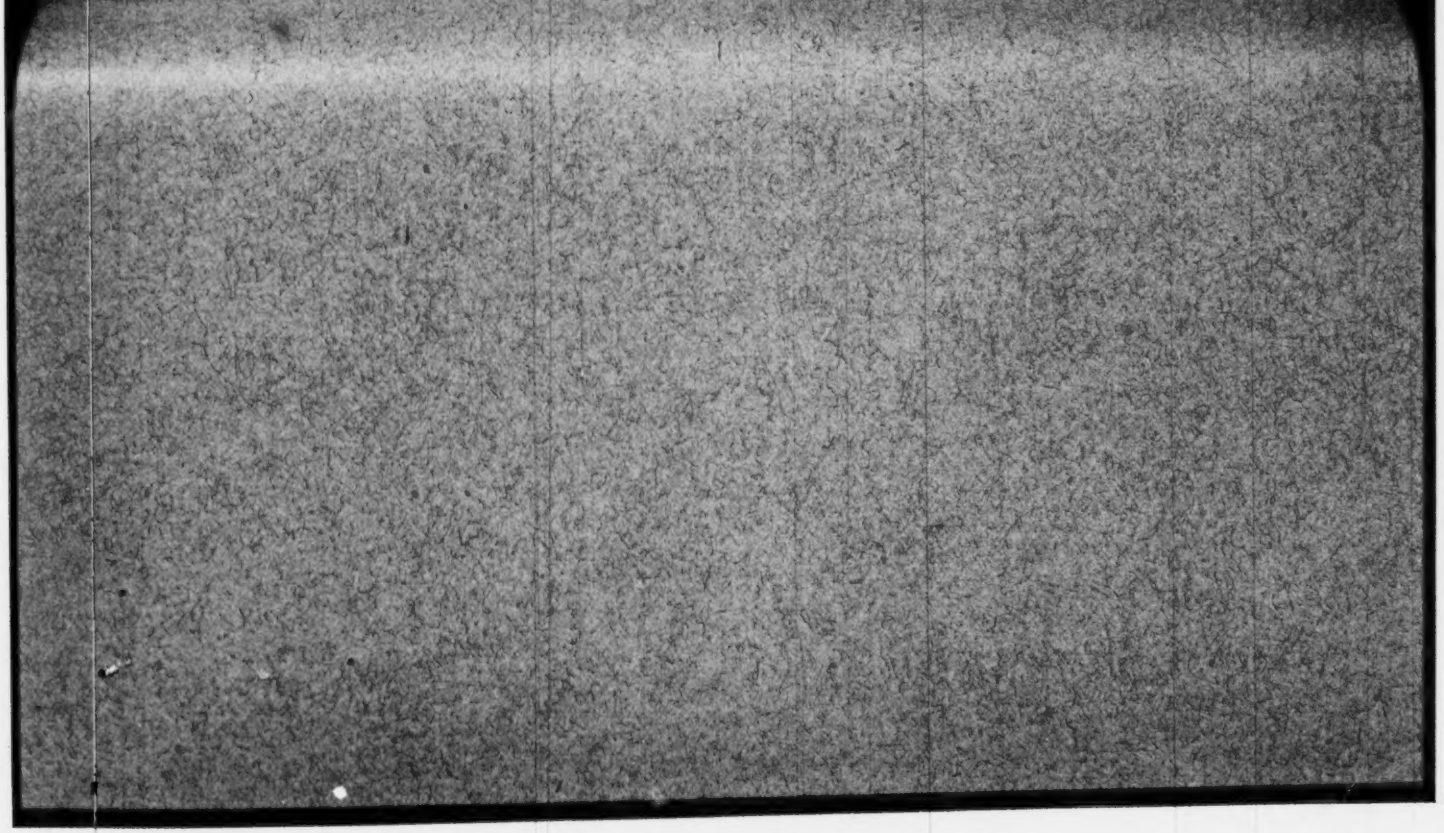
INDIAN TERRITORY,
CENTRAL DISTRICT. } ss.

Before me personally appeared Orange Fuller, the petitioner named in the foregoing petition, and being by me first sworn in due form of law, made oath and says that he has read the said petition, and that the matters and facts contained therein are true to the best of his knowledge, information and belief.

T. N. FOSTER,
Notary Public.

[Seal.]

My commission expires December 4, 1903.



Supreme Court of the United States.

October Term, 1899.

No. .....

(ORIGINAL.)

Ex parte ORANGE FULLER, ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING FIRM OF BUTLER BROTHERS, Petitioner.

Statement of Case and Brief of Argument for Petitioner.

STATEMENT.

This is an original action brought by petitioner as assignee of Butler Brothers, to procure the issuance of a writ for mandamus directed to the honorable W. H. H. Clayton, as judge of the United States Court in the Indian Territory and Central District thereof, commanding said judge to execute the mandate of this honorable court, and to set aside an order made on the fifteenth day of January, A. D. 1900, wherein a new trial was granted on behalf of the defendant, said cause being styled Orange Fuller, assignee, plaintiff below (defendant in error in this court) and The Missouri, Kansas and Texas Railway Company, defendant below (plaintiff in error in this court) said cause in this court bearing number 16,236.

The facts in the case are as follows:

On the twenty-third day of January, 1892, your petitioner herein as assignee of Butler Brothers, instituted an action in the United States Court in the Indian Territory, sitting at Muscogee, against The Missouri, Kansas and Texas Railway Company to recover damages alleged to have occurred by reason of a fire negligently set out by said company, which destroyed the property of Butler Brothers in Chouteau, Indian Territory.

Afterwards, and about the first day of May, 1894, the venue of said cause was properly changed to the second judicial division of the Indian Territory, now the Central District.

The cause was tried to a jury and on the second day of February, 1895, a judgment on the verdict of the jury was entered in favor of the petitioner and against The Missouri, Kansas and Texas Railway Company for eight thousand five hundred ($8,500.00) dollars.

Exceptions were taken, an assignment of errors filed, a supersedeas bond executed and approved, and the cause properly and regularly removed by writ of error into the United States Circuit Court of Appeals, eighth circuit, the record having been filed in that court on the third day of April, 1895.

On the thirtieth day of December, A. D. 1895, after said cause had been submitted on oral and printed arguments, an opinion of the United States Circuit Court of Appeals was filed affirming the judgment of the lower court, and judgment was in said United States Circuit Court of Appeals entered accordingly. (72 Fed. Rep., 467.)

Exceptions to said judgment were taken, and assignments of error filed, a supersedeas bond executed and approved, and the cause properly and regularly removed by writ of error into this court, the record being filed in this court on the twentieth day of March, A. D. 1896, which constituted case numbered 16,236.

Afterwards on the third day of January, A. D. 1898, the said judgment of the United States Court of Appeals, eighth circuit, and the United States Court in the Indian Territory, was affirmed by this honorable court. (168 U. S., 707.)

Afterwards about the third day of March, A. D. 1898, the mandate of this court was issued, and on the twenty-second day of July, 1898, was filed and entered of record in the United States Court in the Indian Territory, Central District.

After the removal of said cause to the United States Circuit Court of Appeals, eighth circuit, and to this Court by writs of error, and while the same was pending in this court, defendant below (plaintiff in error in this court) on the twentieth day of April, A. D. 1896, and without leave of this honorable court first had and obtained, filed in the United States Court in the Indian Territory, Central District, its petition for a rehearing upon newly discovered evidence, and subsequently filed amendments thereto as follows, to-wit:

May seventh, 1897, first amended petition for new trial.

August thirteenth, 1897, second amended petition for new trial.

September twenty-first, 1897, third amended petition for new trial.

May twentieth, 1898, fourth amended petition for new trial.

June twenty-seventh, 1898, amendment to fourth amended petition for new trial.

August thirtieth, 1898, second amendment to fourth amended petition for new trial.

To all of which petitioner filed answer and objected to the consideration of said petition and amendments thereto on the ground that said United States Court in the Indian Territory was without jurisdiction or authority in the premises, and that the issue sought to be made by the newly discovered evidence was not properly before said court, and that the proceedings were, and had been irregular, and not according to law.

On the fifteenth day of January, 1900, and after the mandate of this court had been filed and spread of record in lower court and without leave of this court, the said W. H. H. Clayton, as judge of said court, sustained said petition, and accordingly on that date entered an order upon the records of said United States Court in the Indian Territory granting a new trial in the said cause.

The petition for a new trial presented by The Missouri, Kansas and Texas Railway Company, was filed and granted under Sec. 5155. Mansfields Digests of the Statutes of Arkansas, adopted by Act of Congress, and in force as far as applicable in the Indian Territory, which is as follows:

> "Sec. 5155. Where grounds for new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by petition filed with the clerk not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the court. The evidence may either be by depositions or by witnesses examined in court. But no such application shall be made more than three years after the final judgment was rendered."

ARGUMENT.

The foregoing is a concise statement of the facts and presents, in our opinion, the one proposition of law, to-wit:

Had the United States Court in the Indian Territory jurisdiction to consider or determine the petition for new trial?

And we will now proceed to discuss this single proposition and the law applicable thereto.

Our contention plainly stated is, that after the appeal had on April 3, 1895, been perfected, including the filing and docketing of the record in the United States Circuit Court of Appeals, eighth circuit, and subsequently a removal from said Circuit Court of Appeals, and the filing and docketing of the record in the Supreme Court of the United States on December 30, 1895, the cause was wholly and absolutely removed from the trial court, and during the time said appeals were pending, and until the filing of the mandate in the lower court, the trial court had no authority to even consider, much less to determine, the question of a new trial. And subsequent to the filing of the mandate of the Supreme Court the consideration was still without authority and contrary to law because the time within which to file such a petition had expired; and further, application *must* be made to the Supreme Court for leave to file such a petition.

Mr. Elliott in his work on Appellate Procedure, Section 541, says:

> "The overwhelming weight of authority is that an appeal, properly perfected, removes a case wholly and absolutely from the trial court and places it in the higher tribunal. It is difficult to conceive how it could be otherwise, since it is not possible that two courts can have authority over a single case at the same time. The case must, of invincible necessity, be in the higher court or in the lower court, for it cannot be in both courts. As the authority of the inferior yields to the superior, the case is, for all purposes connected with the consideration and decision of the questions involved in it, completely within the jurisdiction of the appellate tribunal. * * * The loss of jurisdiction is so complete as to require a party who seeks relief from any error excepting an error in making the record or in omitting something from the record, to apply to the higher court. After the cause leaves the lower court it cannot act upon any question involved in the appeal. Where the appeal is made to oper-

ate as a supersedeas, as we have elsewhere shown, it operates not only to divest the jurisdiction of the trial court, but also to preclude the trial court or the parties, from taking steps to enforce the judgment."

See also cases cited in note 1.

In *Citizen's Bank of Wichita vs. Farwell*, 6 C. C. A., p. 30, Judge Caldwell says:

"The cause in which this writ of error was sued out was tried, and judgment rendered therein against the plaintiff in error, at the September term, 1892, of the United States Circuit Court for the district of Kansas, second division. Exceptions were taken, and an assignment of errors filed, and a supersedeas bond executed and approved, and the cause properly and regularly removed into this court by writ of error, the record being filed in this court on the 2d day of December, 1892, which constitutes case No. 213, the opinion in which is filed herewith. 56 Fed. Rep. 570. After the cause had been thus removed into this court, the plaintiff in error appeared at a subsequent term of the circuit court, and filed a motion in that court to vacate, set aside, and annul the said judgment, on various grounds. This motion the court overruled, and thereupon the plaintiff in error sued out this second writ of error in the same cause, and assigned for error the overruling of said motion. The removal of the case into this court under the first writ of error transferred the jurisdiction of the suit to this court, and the jurisdiction of the lower court was at an end. The writ of error is dismissed."

In support of the principle enunciated, Judge Caldwell cites the section quoted from Mr. Elliott's Appellate Procedure, and cites as authority, and follows, *Keyser vs. Farr*, 105, U. S. 265, and *Draper vs. Davis*, 102 U. S. 370.

Mr. Chief Justice Fuller delivering the opinion of the court in *Aspen Mining and Smelting Co. vs. Billings, et al.*, 150 U. S. 35, says:

"The general power of the Circuit Court over its own judgments, decrees and orders, during the existence of the term at which they are made, is undeniable, and an order allowing an appeal is subject to that power so long as the appeal remains unperfected, *and the cause has not passed into the jurisdiction of the appellate tribunal*, citing

Draper vs. Davis, Keyser vs. Farr, *supra.*

See also *Western Wheel Scraper Co. vs. Drinnan*, 79 Fed. 820."

The contrary rule would have applied had the appeal been perfected in all details, as in the case at bar.

In the case of *Kimberly vs. Arms et ux.*, reported in 40 Fed. Rep. 548, the facts present a case in point.

Under the mandate of the Supreme Court of the United States, a final decree was entered in favor of the complainant in May, 1889. The defendants applied for leave to file a bill of review for the purpose of vacating and setting aside the decree, setting up in said bill of review and relying as grounds for relief upon alleged errors of law apparent on the face of the record, *newly discovered evidence and fraud on the part of complainant* in procuring said decree.

But *before* making the application defendants, during the term of court at which said decree was rendered, prayed an appeal to the Supreme Court of the United States, appeal bond was duly executed and approved and the appeal perfected before defendants presented the application for leave to file their bill of review. In addition to the grounds contained in the bill of review as stated above, the defendants alleged that it was not their purpose to perfect their said appeal by filing the record and docketing the cause in the Supreme Court as required by the rules.

The learned judge held that while the appeal had no doubt been improvidently taken and allowed, "still it has the effect of transferring the cause, and the decree sought to be reviewed, into the Supreme Court, etc.," and continuing, said, "with said appeal pending the Supreme Court, whether there rightfully or improvidently, *this court clearly has no authority or jurisdiction to entertain a bill of review to impeach said decree*, over which it has, for the present at least." After stating the proposition that a party cannot concurrently pursue the two remedies of appeal and bill of review, continuing, says:

> "It is accordingly settled (*Ensminger vs. Powers*, 108 U. S. 302, 303,) that while an appeal is pending in the Supreme Court, although there is no *supersedeas*, the Circuit Court has no jurisdiction to vacate the decree in pursuance of the prayer of the bill of review, *because such relief is beyond its control.*"

The leave to file the bill of review having been refused by the Circuit Court, defendant appeals and the appeal was subsequently docketed and dismissed on motion of appellee.

Armes vs. Kimberly, 136 U. S. 629.

The Supreme Court of Arkansas in *Jacks vs. Adair*, 33 Ark. 166, construes section 5155, under which this petition for a new trial was filed.

Notwithstanding the petition was filed after the expiration of the three years allowed by the statutes, yet the court, speaking through Eaken, J., plainly shows the rule to be adopted when a point similar to the one in controversy is brought before it. It says:

> "The Circuit Court, then, did not err in sustaining the demurrer to the petition on the ground that it had not been filed within three years. The statutes make no exceptions, and it is not within any manifest equity of its provisions to make one in a case like this. The appellant had the option to dismiss the appeal, and rely upon his petition at any time within the three years, upon the discovery of new evidence, and there is no more reason for extending the statutory limit where an appeal has been taken, than exists where it has not. The appeal is his own and creates the obstacle against filing the petition below, if any exists, pending the appeal, and rely upon it, until its futility be shown by affirmance of the judgment; and then have a still further extension of three years to file a petition for a new trial. This would enable him, at least at his own option, if not of his wrong, to make an indefinite extension of the limitation dependent upon the delays incident to this court."

It has been truly said if a party can obtain a new trial while an appeal is pending the effect is to terminate the case in the higher court, since nothing is left for decision. There is no longer any controverted question. The effect of such a doctrine is to practically make the superior tribunal yield to the inferior.

The most recent opinion, and one that is directly in point, has been handed down by Mr. Justice Gray of this honorable court, decided March 15, 1897. *In re Patts Petitioner*, 166 U. S. 263, and it contains a clear exposition of the law of this case. The opinion and the authorities cited therein fully sustain our contention on every legal proposition in this application, and go to the extent that we deem it unnecessary to prolong our argument.

The authorities cited conclusively sustain our contentions, to-wit:

1st. That the removal of the cause into the United States Circuit Court of Appeals, and subsequently into the Supreme

Court of the United States, by writs of error transferred the jurisdiction of the suit to the appellate courts and the jurisdiction of the United States Court in the Indian Territory over the case was at an end.

2d. That the United States Court in the Indian Territory was without jurisdiction or authority to consider or determine the petition for new trial while said cause was pending in the appellate courts.

3d. That the United States Court in the Indian Territory was without authority to hear and determine said petition after mandate from the Supreme Court of the United States, for the reason the statutory time had expired.

4th. That no petition for new trial in any event could properly be filed without leave of the appellate court, which was never obtained, and then it must be within time allowed by the statute.

We respectfully submit the motion for leave to file the petition for mandamus should be allowed and an order issued to said judge to show cause why the writ of mandamus should not be issued as prayed.

Respectfully submitted,

RICHARD B. SHEPARD,

HARRISON O. SHEPARD,

Attorneys for Petitioner.

No. 7 Orig.

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Clerk.

Supreme Court of the United States.

No. 7.

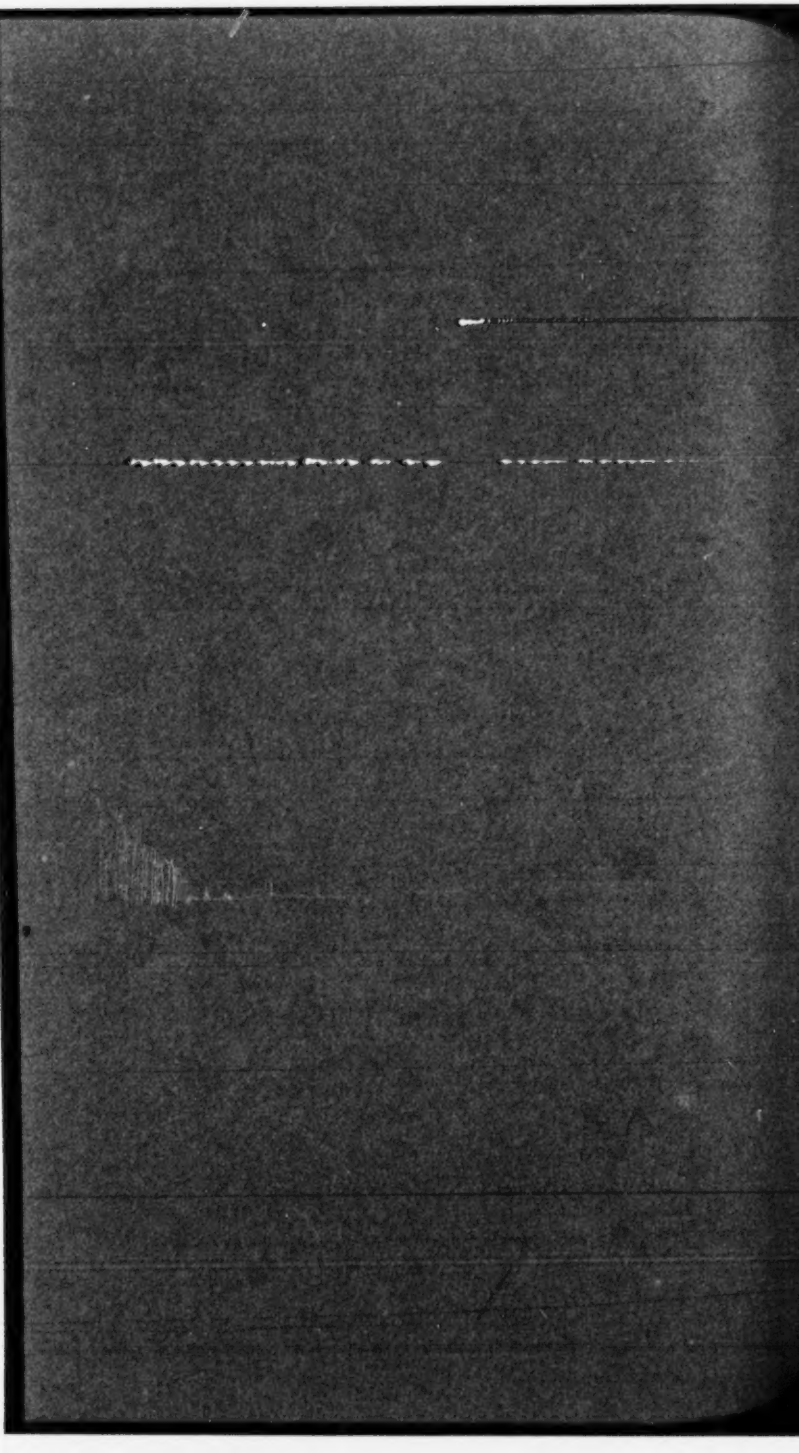
Original O. T. 1900.

EX PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

Demurrer of Petitioner to return of Hon. William M. M. Clayton, Judge, to rule to show cause why a Writ of Mandamus should not be issued.

RICHARD B. SHEPARD,
HARRISON O. SHEPARD,
WM. T. HUTCHINSON,
Attorneys for Petitioner.

Nixon-Jones Printing Co., 213 Pine St., St. Louis.



Supreme Court of the United States.

No. 7.

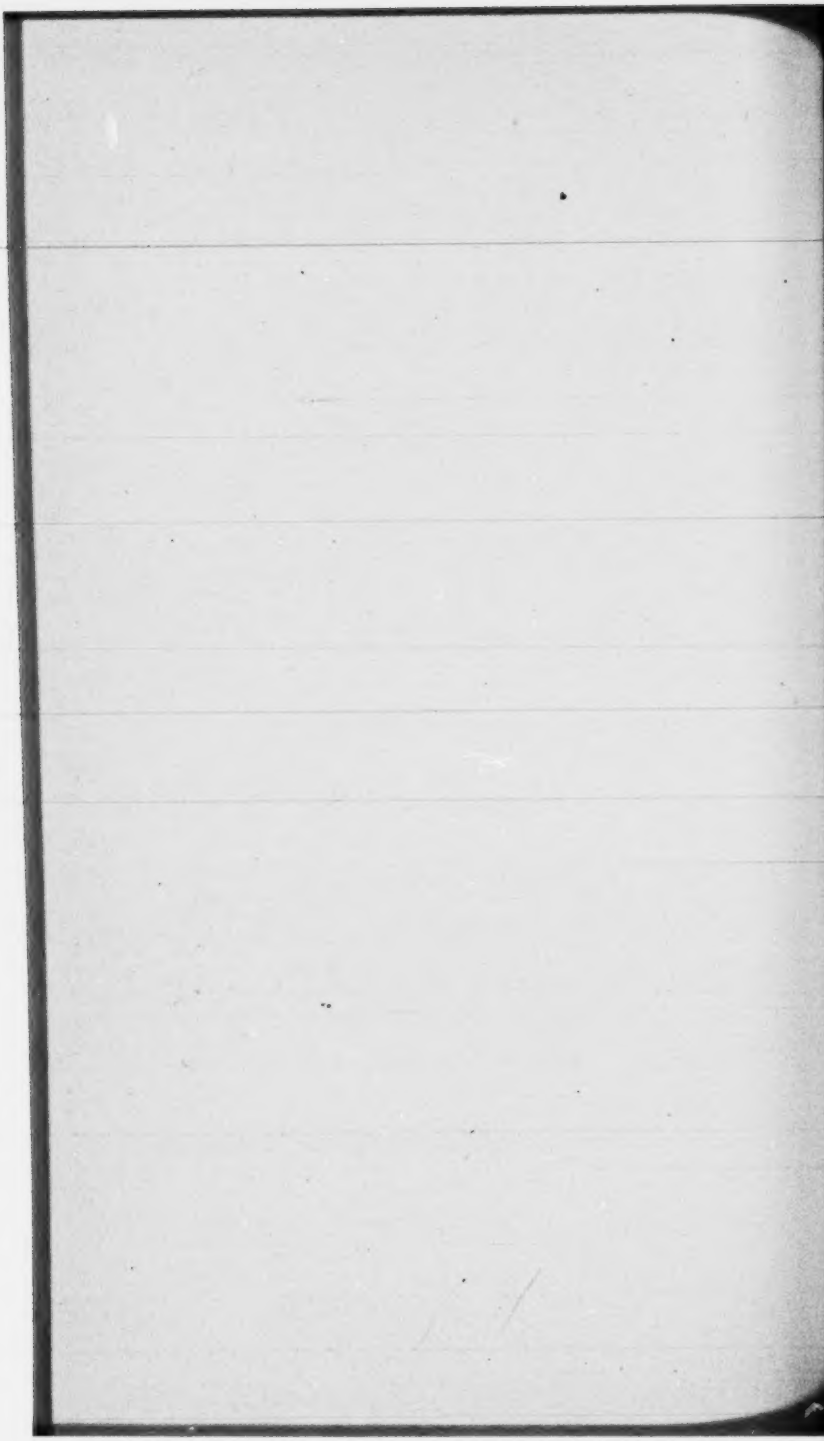
Original O. T. 1900.

EX PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

DEMURRER.

Comes the petitioner herein and demurs to the return of Respondent, Judge Wm. H. H. Clayton, to the rule to show cause why a writ of mandamus should not be issued, because the same does not state facts which constitute in law any grounds to authorize the refusal of said writ, and does not state such facts as constitute in law a sufficient answer to the petition of petitioner herein.

RICHARD B. SHEPARD,
HARRISON O. SHEPARD,
WM. T. HUTCHINGS,
Attorneys for Petitioner.



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AUG 13 1900
JAMES H. McKENNEY,
Clerk

No. 7 Orig.

Brief of Shepard & Hutchings for Petitioner

SUPREME COURT OF THE UNITED STATES

Filed Aug. 13, 1900.

OCTOBER TERM, 1899.

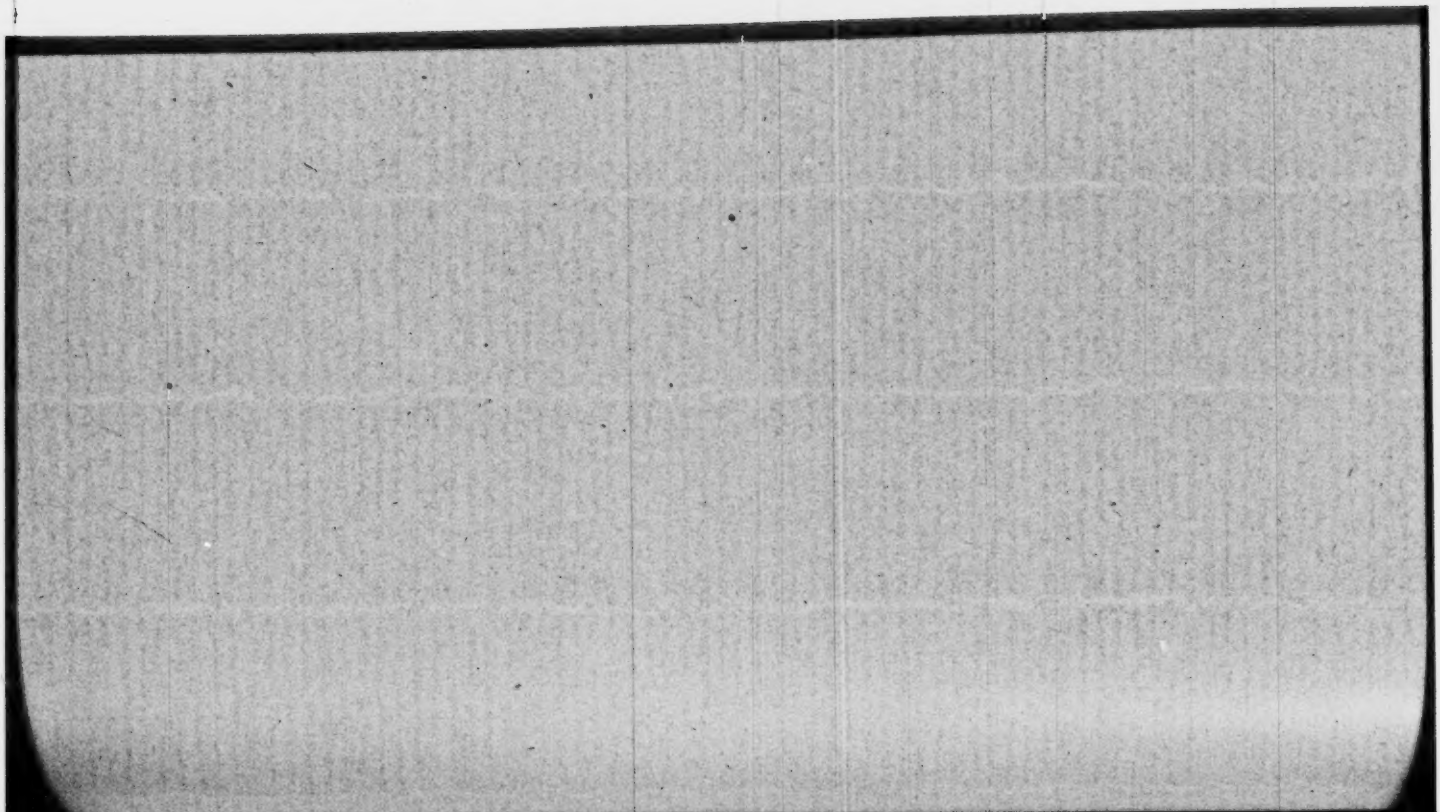
No. 7.
(Original.)

Ex-parte ORANGE FULLER,
Assignee of MANNY G. BUTLER and ROBERT E. BUTLER,
Composing the Firm of BUTLER BROTHERS,
Petitioner.

Brief on Behalf of Petitioner to Sustain His Demurrer Return of Hon. Wm. H. H. Clayton.

RICHARD B. SHEPARD,
HARRISON O. SHEPARD,
WILLIAM T. HUTCHINGS,
Attorneys for Petitioner.

Muskogee Evening Times Print.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

Ex-parte ORANGE FULLER,
Assignee of MANNY G. BUTLER and ROBERT E. BUTLER,
Composing the Firm of BUTLER BROTHERS,
Petitioner.

No. 7.
(Original.)

STATEMENT OF CASE AND BRIEF OF ARGUMENT FOR PETITIONER.

STATEMENT.

This was an original action, brought by petitioner as assignee of Butler Brothers, to procure the issuance of a writ for mandamus directed to the honorable W. H. H. Clayton, as Judge of the United States Court in the Indian Territory, and Central District thereof, commanding said Judge to execute the mandate of this honorable Court, and to set aside an order made on the fifteenth day of January, A.D. 1900, wherein a new trial was granted on behalf of the defendant, said cause being styled Orange Fuller, assignee, plaintiff below (defendant in error in this Court), and The Missouri,

Kansas & Texas Railway Company, defendant below (plaintiff in error in this Court), said cause in this Court bearing number 16,236.

The facts in the case are as follows:

On the twenty-third day of January, 1892, your petitioner herein, as assignee for Butler Brothers, instituted an action in the United States Court in the Indian Territory, sitting at Muskogee, against The Missouri, Kansas & Texas Railway Company to recover damages alleged to have occurred by reason of a fire negligently set out by said company, which destroyed the property of Butler Brothers in Chouteau, Indian Territory.

Afterwards, and about the first day of May, 1894, the venue of said cause was properly changed to the second judicial division of the Indian Territory, now the Central District.

The cause was tried to a jury and on the second day of February, 1895, a judgment on the verdict of the jury was entered in favor of the petitioner and against The Missouri, Kansas & Texas Railway Company for eight thousand, five hundred ($8,500.00) dollars.

Exceptions were taken, an assignment of errors filed, a supersedeas bond executed and approved, and the cause properly and regularly removed by writ of error into the United States Circuit Court of Appeals, Eighth circuit, the record having been filed in that Court on the third day of April, 1895.

On the thirteenth day of December, A.D. 1895, after said cause had been submitted on oral and printed arguments, an opinion of the United States Circuit Court of Appeals was filed affirming the judgment of the lower Court, and judgment was in said United States Circuit Court of Appeals entered accordingly. *(72 Fed. Rep., 467.)*

Exceptions to said judgment were taken, and assignments of error filed, a supersedeas bond executed and approved, and

the cause properly and regularly removed by writ of error into this Court, the record being filed in this Court on the twentieth day of March, A.D. 1896, which constituted case numbered 16,236.

Afterwards on the third day day of January, A.D. 1898, the said judgment of the United States Court of Appeals, Eighth circuit, and the United States Court in the Indian Territory, was affirmed by this honorable Court. *(168 U. S., 707.)*

Afterwards about the third day of March, A.D. 1898, the mandate of this Court was issued, and on the twenty-second day of July, 1898, was filed and spread of record in the United States Court in the Indian Territory, Central District.

After the removal of said cause to the United States Circuit Court of Appeals, Eighth circuit, and to this Court by writs of error, and while the same was pending in this Court, defendant below (plaintiff in error in this Court) on the twentieth day of April, A.D. 1896, and without leave of this honorable Court first had and obtained, and without dismissing his writ of error here, filed in the United States Court in the Indian Territory, Central District, its petition for a rehearing upon newly discovered evidence, and subsequently filed amendments thereto as follows, to-wit:

May seventh, 1897, first amended petition for new trial.

August thirteenth, 1897, second amended petition for new trial.

September twenty-first, 1897, third amended petition for new trial.

May twentieth, 1898, fourth amended petition for new trial.

June twenty-seventh, 1898, amendment to fourth amended petition for new trial.

August thirtieth, 1898, second amendment to fourth amended petition for new trial.

To all of which petitioner filed answer and objected to the consideration of said petition and amendments thereto on the ground that the United States Court in the Indian Territory was without jurisdiction or authority in the premises, and that the issue sought to be made by the newly discovered evidence was not properly before said Court, and that the proceedings were, and had been irregular, and not according to law.

On the fifteenth day of January, 1900, and after the mandate of this Court had been filed and spread of record in lower Court, and without leave of this Court. the said W. H. H. Clayton, as Judge of said Court, sustained said petition, and accordingly on that date entered an order upon the records of said United States Court in the Indian Territory, granting a new trial in the said cause.

The petition for a new trial presented by The Missouri, Kansas and Texas Railway Company was filed and granted under Sec. 5155 Mansfield's Digest of the Statutes of Arkansas, adopted by act of Congress, and in force as far as applicable in the Indian Territory, which is as follows:

"Sec. 5155. Where grounds for new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by petition filed with the Clerk not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the Court. The evidence may either be by depositions or by witnesses examined in Court. But no such application shall be made more than three years after the final judgment was rendered."

The motion of petitioner for leave to file his petition for writ of mandamus was sustained by this Court and an order was directed to the Honorable W. H. H. Clayton, as Judge of the United States Court for the Central District of the Indian Territory, on March 26th, 1900, to show cause why a

writ of mandamus should not issue against him, commanding him to execute the mandate of the Court issued as above set forth. The return of said Judge to the rule issued as aforesaid has been duly filed, to which the petitioner has filed his demurrer.

ASSIGNMENTS OF ERROR.

The Court below erred,

First, in considering and determining the petition for a new trial while said cause was pending in this Court.

Second, in considering and determining the petition for a new trial when no leave to file a bill of review, or any other kind of petition, had been obtained from this Court.

Third, because the return of the Judge of the Central District of the United States is insufficient in law to show any reason why a writ of mandamus should not issue against him commanding him to execute the mandate of this Court.

ARGUMENT.

In discussing the legal questions involved in this case it is well in the outset to distinguish between the practice in common law causes and that prevailing in equity causes. Had this been a suit in equity and the defendant below had followed the ordinary practice in such cases and filed his bill of review, setting up proper new matter for a new hearing, it would still have been in the position that it is now, for the bill of review could not be entertained unless leave to file the same had been obtained from this Court, in which the case was then pending.

In re Potts, 168 U. S., 293.

Railway vs. Litchfield, 68 U. S., 69-73.

In re Washington & Georgetown Ry., 140 U. S., 91.

Durant vs. Storrow, 101 U. S., 555-557.

The reply might be, however, that under such a practice it would still not be too late to ask permission of this Court to permit the filing of such a bill in the lower Court. A bill of review, however, can be filed only to reverse or modify a decree in chancery and not for the purpose of obtaining new trial in suits at law for after-discovered testimony, especially when no fraud was practiced by the successful party.

2 *Beach on Modern Eq. Prac.*, Sec. 852.

1 *Foster Fed. Prac.*, Sec. 354.

Where, as in this case, the point was well known to the attorney, the permission is always obtained at the final hear-

ing and the proper practice is to insert it in the decree and mandate issued by the Appellate Court.

Watson vs. Stevens, 53 Fed., 31.

The remedy provided by Mansfield's Digest, Section 5155, and a part of the pleading and practice act in force in this Territory is exclusive in suits at law. We are bound by the construction put by the Supreme Court of Arkansas upon that statute before it was put in force in this jurisdiction.

Sanger vs. Flow, 1 C. C. A., 56, 48 Fed., 152.

Appllos vs. Brady, 49 Fed., 401.

McClellan vs. Pyeatt, 50 Fed., 686.

Rainwater Hat Co. vs. Malcolm, 51 Fed., 734.

Hogg vs. Emerson, 6 How., 483.

Stutsman Co. vs. Wallace, 142 U. S., 295.

The Supreme Court of Arkansas, in *Jacks vs. Adair, 33 Ark., 166*, establishes the practice which should have been pursued by the defendant in the Court below, or the plaintiff in error in the Supreme Court, and that is that it had the option to dismiss his writ of error in this Court and rely upon his petition to get a new trial, or pursue to the bitter end his effort to obtain a reversal of the judgment on the case made below. That that remedy is exclusive in cases of common law is further shown by Chapter 38 of Mansfield's Digest of the laws of Arkansas, a chapter also put in force in this jurisdiction. Section 3904 shows that such final orders may be reversed, vacated or modified, either by an Appellate Court or by the Court in which the judgment was rendered in the method pointed out in Section 3909.

Johnson vs. Campbell, 52 Ark., 316.

Whatever, therefore, may be the practice and statutes of the various States of the Union the decision of the Arkansas courts in construing our statutes and of this, the Supreme Court of the United States, have positively and unequivocally

settled the practice in such cases in this jurisdiction, and that is that in actions at law the plaintiff in error must dismiss his appeal before he can proceed under Section 5155, and in suits in equity he must first get leave from the Appellate Court for permission to file his bill of review. Under the Federal practice the docketing of the case in the Appellate Court removes it from all control or supervision on the part of the Court below.

Citizens Bank of Wichita vs. Farwell, 6 C. C. A., 30.

Aspen Mining & Smelting Co. vs. Billings, 150 U. S., 35.

Kimberly vs. Arms, 40 Fed., 548.

Respondent, in his return to the rule in this cause, has quoted at length from the decision and evidence in another case arising out of the same circumstances as this one and in which the railroad company used the testimony which was set up in the petition in this case for a new trial. Additional testimony, which, in the mind of the Judge, might be sufficient to weigh against one party or the other, might be entirely insufficient to support a petition for a new trial or a bill of review for the same. The new evidence brought in was largely cumulative, and to a very large degree intended to impair the credibility of former witnesses in the trial in this cause. Now such testimony in the mind of the Court of Appeals might seem sufficient to turn the scale against the plaintiff, but the courts all agree that as newly discovered evidence it is insufficient to warrant a new trial, whether sought by bill of review or otherwise.

Southard vs. Russell, 16 How., 549.

The proceedings taken by the railway company to obtain a new trial in this cause were without warrant of law and the Court entertaining them was acting without jurisdiction. The limitation of three years since the discovery of the new testi-

mony has fully run and no new petition could now be filed The Judge bases his actions exclusively upon Section 5155 of Mansfield's Digest. As we think we have shown, this gave him no warrant whatever for his actions, and this Court cannot do otherwise than compel him to enforce its mandate and issue an execution thereon against the defendant railroad and its bondsmen for the full amount of our judgment, interest and costs.

We ask that in passing upon this matter the Court take into consideration the brief formerly filed by us to sustain the motion for a rule against the Judge of the United States Court in the Indian Territory, and Central District thereof, and upon which said rule was granted.

Respectfully submitted,

RICHARD B. SHEPARD,
HARRISON O. SHEPARD,
WILLIAM T. HUTCHINGS,
Attorneys for Petitioner.

No. 7 Orig.

FILED
MAY 14 1900
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

No. 7.
Original O. T. 1900.

EX PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

Return of Respondent, Judge William H. H. Clayton, to rule to show cause why Writ of Mandamus should not be issued.

JAMES HAGERMAN,
CLIFFORD L. JACKSON,
JOSEPH H. BEYSON,
Counsel for Respondent.

Hudson-Kimberly Publishing Co., 310 Pine St., St. Louis.

Supreme Court of the United States.

No. 7.

Original O. T. 1900.

EX PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

Return of Respondent, Judge William H. H. Clayton, to rule to show cause why Writ of Mandamus should not be issued.

Now at this day comes William H. H. Clayton, as Judge of the United States Court for the Central Judicial District of the Indian Territory, and for return to the rule of this court upon him entered on March 26th, 1900, to show cause why a writ of mandamus should not issue against him commanding him to execute the mandate of this Honorable

Court issued out of the office of the clerk of this Honorable Court on the 10th day of June, 1898, and which was upon the 22nd day of July, 1898, filed and spread upon the records of the said District Court, now presided over by the said respondent as Judge, and commanding said respondent to set aside the order made by said District Court, so presided over by said respondent, on the 15th day of January, 1900, granting a new trial in the case of Orange Fuller, as Assignee of Butler Brothers v. The Missouri, Kansas and Texas Railway Company, respectfully states:—

That in making the order granting a new trial in the said case of Orange Fuller, as Assignee of Butler Brothers v. The Missouri, Kansas and Texas Railway Company, said respondent intended no disobedience of nor disregard to the mandate of this Honorable Court but proceeded under what said respondent deemed to be his imperative duty as such Judge under Section 5155 of Mansfield's Digest of the Statutes of Arkansas which was extended over and put in force in the Indian Territory by virtue of an Act of Congress, entitled "An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes," approved May 2, 1890, and which said Section 5155 is as follows:—

"Sec. 5155. Where grounds for new trial are "discovered after the term at which the verdict

"or decision was rendered, the application may "be made by petition filed with the clerk not "later than the second term after the discovery, "on which a summons shall issue, as on other "complaints, requiring the adverse party to ap- "pear and answer it on or before the first day "of the next term. The application shall stand "for hearing at the term to which the summons "is returned executed, and shall be summarily "decided by the court. The evidence may "either be by depositions or by witnesses ex- "amined in court. But no such application "shall be made more than three years after the "final judgment was rendered."

The said respondent was also acting under the precedent established by a court superior to said District Court, to wit, The United States Court of Appeals for the Indian Territory, in its opinion in a companion case to the Orange Fuller case, to wit, the case of William L. Wilder v. The Missouri, Kansas and Texas Railway Company, which said opinion is found on pages 490 to 496, inclusive, 53 Southwestern Reporter, a part of which opionion is as follows:—

"We have examined the voluminous record "in this case with close attention, as well as the "briefs and arguments of counsel, and at the "outset are constrained to say that there is very "great doubt in our opinion as to the origin of "the fire. It appears that this case was tried

" before a jury, and resulted in a mistrial, by " failure of the jury to agree. It was tried " again, and withdrawn by reason of the sickness " of a juror, and on this the third trial a verdict " was for plaintiff (the appellee here). It also " appears that several other suits have been in- " stituted growing out of that fire, against the " railway company, the appellant here. One of " them (Fuller v. Railroad Co.) was appealed by " the railroad company to the Circuit Court of " Appeals (18 C. C. A. 641, 72 Fed. 467), and " thence to the United States Supreme Court (18 " Sup. Ct. 944), where the case was affirmed " against the railroad company by a divided " court, four of the judges being in favor of the " affirmance of the case, and four against (the " court being equally divided); but it also ap- " pears that the case at bar had much more evi- " dence in behalf of the defendant than did the " Fuller case, and counsel for appellant con- " fidently asserts that, had the facts in the case " at bar been in the record of the Fuller case, " reversal would have followed, without question. " Counsel for appellant therefore insists that the " trial court should have sustained his motion to " direct the jury to return a verdict for the " defendant.

" The appellant introduced, as appears from " the record, about thirty more witnesses on the " trial of the case at bar than were introduced " by it on the trial of the Fuller case, and much " of this testimony related to the direction the

" wind was blowing at the time the fire occurred. " This was one of the most material questions " presented to the jury. The appellee had six " witnesses that testified that the direction of the " wind was from the southeast, and the appel- " lant had sixteen witnesses that the wind was " from the south, and on that point twelve more " than in the Fuller case. The wind had to be " from the southeast to carry the smoke from " the engine to the barn, as the barn was 300 " feet west of the main track, and the measure- " ment showed that from the point where the " engine was located by appellee's witnesses to " the southeast corner of his barn was 359 feet, " and appellee's witnesses say the wind was " strong from the southeast. If such were the " case, it would necessarily carry the fire from " the barn in a northwesterly direction; and " here develops a physical fact of very great " significance. The fire from the barn extended " and destroyed the property north of the barn, " and not northwest from the barn. The resi- " dence of John D. Moore was 661 feet from the " main track of the Missouri, Kansas & Texas " Railroad, and was located 4,260 feet from the " barn. Hence in a short time the fire had extended " on a line due north, and parallel to the main " track of the Missouri, Kansas and Texas " road, which ran north, 10 degrees east, and " had only varied in that distance of 4,260 " feet the difference between 300 feet and 661 " feet, while, if the witnesses of the appellee are

"correct, the wind had carried the smoke to the "barn, 300 feet from the main track, in a dis- "tance from the engine to the barn of 359 feet. "The physical facts sustain the testimony of "the appellant's witnesses, and not the wit- "nesses of the appellee. Other evidence was "introduced by appellant tending to show that "the barn was frequented by people who drank "whisky and smoked pipes and cigars; that a "small room was on the upper floor of the barn, "which was used for that purpose, and that im- "mediately preceding the fire Dole Baugh took "his horse out of the stable, and started east "across the railroad track, met Homesley and "Springston, and was talking to them; that he "was smoking a cigar at the time, and was ap- "parently under the influence of liquor; that, "a very few moments after his leaving the barn, "it was seen to be on fire, and Homesley and "Springston called Baugh's attention to the "fire; that Baugh stated to a number of wit- "nesses that he was sorry, and knew Wilder "would blame him; that the fire was started in "the barn, just about where he got his horse; "that he went in the barn, smoking, to get his "horse, and had not been out over fifteen min- "utes when the fire was discovered. A number "of witnesses testified to the statement that it "was frequently mentioned in the town, while the "fire was burning, that Baugh had set the barn "on fire. Baugh, in rebuttal, denies these state- "ments, but the number of unimpeached wit-

"nesses testifying to the statements makes his "evidence of little value. Evidence was also "given that during the fire Wilder, the appellee, "accused Baugh of starting the fire. It was "also shown that Baugh was the stepson-in-law "of Wilder, and it is also shown by evidence "that Baugh was the one who developed the "theory that the engine of the appellant "started the fire, and he went to the telegraph "agent and stated that he was accused of set- "ting fire to the barn, and wanted the number "of the engine that hauled the stock train that "afternoon. Mose Alberty, witness for appel- "lee, testified that the fire burned two oat "stacks over 700 feet due north of the barn, "and that the fire burned all buildings "due north of the barn, and did not "burn two haystacks less that 300 feet "northwest of the barn, nor did the fire burn "stores to the west of it, or Mrs. Grant's "hotel, to the northwest of it; and he, with "William Calvert and Francis Eller, all wit- "nesses for appellee, testified they first dis- "covered smoke and heat coming out from the "east door of the barn, while appellee claims "that the fire first appeared in the upper story "on the southeast corner, where hay was stored "in the barn, and where his witnesses testify the "smoke from the engine struck the barn. The "appellee's witnesses testify that smoke came "out of the engine and the wind drove the "smoke to the southeast corner of the barn,

"but none of them testify that sparks or fire "were emitted from the engine; and the jury, "by their verdict, must have presumed that the "smoke carried sparks of fire. There was no "positive testimony to that effect.

* * * * * * * * * *

"We do not believe, under the proof in this "case, that the appellee is entitled to recover."

Respondent would further respectfully show that in view of this opinion in the said Wilder case all of the companion cases for damages growing out of the same fire have been voluntarily dismissed by the respective plaintiffs under stipulations providing that each party shall pay their own costs, and that the plaintiffs shall abandon all claims for damages, copies of which stipulations and orders of dismissal are hereto attached and marked "Exhibit A," "Exhibit B," "Exhibit C," "Exhibit D," "Exhibit E," "Exhibit F," and "Exhibit G," respectively, and made a part of this return.

Respondent would further respectfully show that the order of court granting a new trial in the said Orange Fuller case is in words and figures as follows: —

"Now at this day comes the above named "defendant, and in support of the fourth "amended petition for a new trial in this case "files certified copy of opinion of the United "States Court of Appeals for the Indian Ter- "ritory, in the case of Missouri, Kansas &

"Texas Railway Company, Appellant, versus "William L. Wilder, Appellee, and the "Court having fully considered the said "amended petition for a new trial in this "case, which was heretofore continued by "agreement between counsel to this the "December, 1899, term of this court, "together with the evidence thereon, and the "briefs of counsel filed both in support of and "in opposition to said amended petition for new "trial, and the court having been fully advised "in the premises finds that the original petition "for new trial was filed on the twentieth day "of April, 1896, in accordance with Section "5155 of Manfield's Digest of the Statutes of "Arkansas, extended over the Indian Territory "by Act of Congress, May 2d, 1890, and that "summons was duly issued and served upon "the plaintiff as required by said statute, "and that the said plaintiff has duly "entered his appearance in these proceed-"ings, and filed answer to the original petition "for new trial, as well as to the different "amendments thereto, as such amendments "have been based upon such additional evidence "as the defendant alleges was discovered sub-"sequent to the filing of the original petition "for new trial and amended petitions for new "trial respectively, and the court further finds "that the evidence fully sustains the said peti-"tion for new trial and that under the statute "hereinabove referred to, and in view of the

"opinion of the United States Court of Ap-
"peals for the Indian Territory in the case of
"the Missouri, Kansas and Texas Railway
"Company, Appellant, v. William L. Wilder,
"Appellee, a companion case to this, that said
"petition should be sustained.

"Wherefore the court orders that the said pe-
"tition be sustained and a new trial be granted."

A certified copy of which order is hereto attached and marked "Exhibit H," and made a part of this return.

Respondent would respectfully further show that it fully appeared upon the hearing of the petition for new trial in the said Orange Fuller case that the defendant railway company had used all possible diligence to discover the actual origin of the fire upon which that suit was founded prior to the time of the trial of that case, and that it was to a large extent prevented from so doing by the strong influence which the plaintiffs in said case exerted over the minds of the people in the community where the fire occurred; and also by the actions of one of the plaintiffs whom it is shown urged several of the witnesses to conceal what information they had with reference to the origin of the fire, and that after the trial of the Orange Fuller case in the District Court the said railway company continued its efforts to discover the real origin of the fire, and as the result of its efforts it produced reliable new witnesses who proved by newly discovered and strong circumstantial evidence

that the fire was set out through accident by one Dole Baugh, and also proved by the admission of the said Dole Baugh, made while the fire was burning, that he had so set it out, and it was this evidence which largely induced the United States Court of Appeals for the Indian Territory to render the opinion of reversal heretofore cited in the said Wilder case as well as induce the plaintiffs in the companion cases to dismiss their cases, and that not only the Judges of the District Court and the United States Court of Appeals for the Indian Territory, but the plaintiffs in the above suits, became satisfied that these suits were all matters of great injustice and wrong, and satisfied this respondent that the original judgment in the Orange Fuller case was also a great injustice and wrongfully obtained and had the actual truth been fully known and not purposely concealed that the judgment in the Orange Fuller case would not have been affirmed by the United States Circuit Court of Appeals for the Eighth Circuit or this Honorable Court, and your respondent further realized that a greater injustice and wrong would be done by permitting the plaintiffs in this said Orange Fuller case to recover when the truth had been suppressed, and when all other plaintiffs were prevented from recovering because of the fact that the whole truth had come to light.

Your respondent further respectfully shows that he has at no time been disposed to disregard the mandate of this Honorable Court in this Orange Fuller case, but by reason of the great hardships of

the judgment in the said Orange Fuller case, and by the peculiar statute extended over the Indian Territory covering the procedure in this case, which in fact is really not a motion for a new trial, but an independent statutory action, unlike the statutes prevailing in any other jurisdiction of the United States save in the District of Columbia relating to the Court of Claims (see Ex Parte U. S., 16 Wallace, 699, and Ex Parte Russell, 13 Wallace, 664) and in the State of New York (see Henry v. Allen, 41 Northeastern Reporter, 694, and in the State of Iowa, Cook v. Smith, 12 N. W. 617, and in California, Naglee v. Spencer, 60 Cal. 10), where it has been held that notwithstanding an appeal to a higher court, or a mandate from a higher court that new trials must be granted in such cases as the one at bar, your respondent felt constrained without intending any discourtesy to this Honorable Court, or any disregard or discourtesy to its mandate to enter the order complained of in this case, and which order your respondent is perfectly willing to set aside should it seem meet and proper to this Honorable Court that such should be done.

WM. H. H. CLAYTON,
As Judge of the United States Court for the Central Judicial District of the Indian Territory.

Respondent.

JAMES HAGERMAN,
C. L. JACKSON,
JOSEPH M. BRYSON,
Counsel for Respondent.

EXHIBIT A.

TRANSCRIPT OF PROCEEDINGS.

The United States of America,
United States Court, Indian Territory,
Central District. } ss.

At a stated term of the United States Court in the Indian Territory, Central District, begun and had in the court rooms, at South McAlester in the Indian Territory, on the seventh day of May, being the first Monday of that month, in the year of our Lord one thousand nine hundred, and of the independence of the United States of America the one hundred and twenty-third.

Present: The Hon. Wm. H. H. Clayton, Judge of said court.

On Monday, the seventh day of May, 1900, among the proceedings had were the following, to wit:—

E. Ferrell,
Plaintiff,

No. 2066. vs.

The Missouri, Kansas & Texas Railway Company,
Defendant.

Now at this day comes the parties to the above

entitled and numbered cause and file stipulation showing that the said case is finally settled, plaintiff waiving and abandoning all claims for damages, and each of the parties agreeing to pay its own court costs.

It is therefore adjudged that this case shall be dismissed, and that the parties plaintiff as well as defendant shall each pay the court costs incurred by them in the prosecution and defense of this case respectively.

The United States of America,
United States Court, Indian Territory,
Central District. } ss.

I, E. J. Fannin, Clerk of the United States Court, within and for the Central District of the Indian Territory aforesaid, do hereby certify that the foregoing order is truly taken, and correctly copied from Court Journal 9, page , of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at South McAlester, this 7th day of May, A. D. 1900.

E. J. FANNIN, Clerk.

EXHIBIT B.

IN THE UNITED STATES COURT IN THE INDIAN TERRITORY AT SOUTH M'ALESTER IN THE CENTRAL DISTRICT.

E. Ferrell, Plaintiff,	
No. 2066. vs.	Stipulation for Settlement.
Missouri, Kansas & Texas Railway Company, Defendant.	

It is hereby stipulated and agreed by and between the parties to the above entitled and numbered cause that the said cause together with all matters involved therein by and hereby are fully and finally settled, and that this cause shall be at once finally dismissed, each party to pay its own costs. The plaintiff waiving any and all claims for damages sued upon in this cause.

WILLIAM T. HUTCHINGS,
Atty. for Plaintiff.

CLIFFORD L. JACKSON,
Atty. for Defendant.

Indorsed No. 2066. In the United States Court at South McAlester, Indian Territory, E. Ferrell v. M. K. & T. Ry. Co. Stipulation for Settlement,

filed in open court May 7th, 1900, E. J. Fannin, U. S. Clerk.

I hereby certify that the within is a true and correct copy of the original and indorsements, thereon.

Witness my hand and seal of office this 7th day of May, 1900.

E. J. FANNIN, Clerk.

EXHIBIT C.

TRANSCRIPT OF PROCEEDINGS.

The United States of America,
United States Court, Indian Territory,
Central District. } ss.

At a stated term of the United States Court in the Indian Territory, Central District, begun and had in the court rooms, at South McAlester in the Indian Territory, on the seventh day of May, being the first Monday of that month, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-third.

Present, the Hon. Wm. H. H. Clayton, Judge of said Court.

On Monday, the seventh day of May, 1900, among the proceedings had were the following, to wit: —

William Ehler, Plaintiff,

No. 2067. vs.

The Missouri, Kansas and Texas Railway Company, Defendant.

Now at this day come the parties to the above entitled and numbered cause and file stipulation showing that the case is finally settled, plaintiff waiving and abandoning all claims to damages, and each of the parties agreeing to pay its own court costs.

It is therefore adjudged that this case shall be dismissed, and that the parties plaintiff as well as defendant shall each pay the court costs incurred by them in the prosecution and defense of this case, respectively.

The United States of America,
United States Court, Indian Territory,
Central District. } ss.

I, E. J. Fannin, Clerk of the United States Court, within and for the Central District of the Indian Territory aforesaid, do hereby certify that the foregoing order is truly taken, and correctly copied from Court Journal 9, page , of said Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at South McAlester this 7th day of May, A. D. 1900.

E. J. FANNIN, Clerk.

EXHIBIT D.

IN THE UNITED STATES COURT IN THE INDIAN TERRITORY AT SOUTH M'ALESTER IN THE CENTRAL DISTRICT.

William Ehler, Plaintiff,

No. 2067. vs. Stipulation for Settlement.

Missouri, Kansas & Texas Railway Company, Defendant.

It is hereby stipulated and agreed by and between the parties to the above entitled and numbered cause that the said cause together with all matters involved therein and hereby are fully and finally settled, and that this cause shall be at once finally dismissed, each party to pay its own costs. The plaintiff waiving any and all claims for damages sued upon in this cause.

WILLIAM T. HUTCHINGS,
Atty. for Plaintiff.

CLIFFORD L. JACKSON,
Atty. for Defendant.

Indorsed: No. 2067. In the United States Court at South McAlester, Indian Territory. William Ehler v. M. K. & T. Ry. Co. Stipulation for

settlement, filed in open court, May 7th, 1900, E. J. Fannin, U. S. Clerk.

I hereby certify that the within is a true and correct copy of the original and indorsements thereon filed in this cause.

Witness my hand and seal of office this 7th day of May, 1900.

E. J. FANNIN, Clerk.

EXHIBIT E.

TRANSCRIPT OF PROCEEDINGS.

The United States of America,
United States Court, Indian Territory, } ss.
Central District.

At a stated term of the United States Court in the Indian Territory, Central District, begun and had in the court rooms, at South McAlester, in the Indian Territory, on the seventh day of May, being the first Monday of that month, in the year of our Lord one thousand nine hundred, and of the Independence of the United States of America the one hundred and twenty-third.

Present: The Hon. Wm. H. H. Clayton, Judge of said court.

On Monday the seventh day of May, 1900, among the proceedings had were the following, to wit: —

W. C. Rogers, Plaintiff,

No. 2099. vs.

The Missouri, Kansas and Texas Railway Company, Defendant.

Now at this day come the parties to the above entitled and numbered cause and file stipulation showing that the case is finally settled, the plaintiff waiving and abandoning all claims for damages, each of the parties agreeing to pay its own court costs.

It is therefore adjudged that this case shall be dismissed, and that the parties plaintiff as well as defendant shall each pay the court costs incurred by them in the prosecution and defense of this case respectively.

The United States of America,
United States Court, Indian Territory, } ss.
Central District.

I, E. J. Fannin, clerk of the United States Court, within and for the Central District of the Indian Territory aforesaid, do hereby certify that the foregoing order is truly taken, and correctly copied from Court Journal 9, page of said court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at South McAlester this 7th day of May, A. D. 1900.

E. J. Fannin, Clerk.

EXHIBIT F.

IN THE UNITED STATES COURT IN THE INDIAN TERRITORY AT SOUTH M'ALESTER IN THE CENTRAL DISTRICT.

W. C. Rogers,
Plaintiff,

No. 2099. vs.

Missouri, Kansas & Texas Railway Company,
Defendant.

Stipulation for Dismissal.

It is hereby stipulated and agreed by and between the parties to the above entitled and numbered cause that the said cause together with all matters involved therein be and hereby are fully and finally settled, and that this cause shall be at once finally dismissed each party to pay its own costs. The plaintiff waiving any and all claims for damages sued upon in this cause.

WILLIAM T. HUTCHINGS,
Atty. for Plaintiff.

CLIFFORD L. JACKSON,
Atty. for Defendant.

Indorsed: No. 2099. In the United States Court at South McAlester, Indian Territory, W. C. Rogers v. M. K. & T. Ry. Co. Stipulation for

Settlement, filed in open court, May 7th, 1900, E. J. Fannin, U. S. Clerk.

I hereby certify that the within is a true and correct copy of the original and indorsements thereon.

Witness my hand and seal this 7th day of May, 1900.

E. J. FANNIN, Clerk.

EXHIBIT G.

COPY OF ORDER OF COURT.

United States of America,
Indian Territory — Northern District. } ss.

In the United States Court for the Northern District, Indian Territory, at a term thereof begun and held at Muskogee, in the Indian Territory, on the 4th day of December, A. D. 1899. Present, the Honorable John R. Thomas, Judge of said Court.

On April 2nd, 1900, the following order was made and entered of record, to wit: —

William L. Wilder,
vs.
M. K. & T. Ry. Co. } No. 1896.

Now comes the parties by their attorneys, and by agreement, it is ordered by the Court that this cause

be and the same is hereby dismissed as per stipulation this day filed, which is in words and figures as follows, to wit: —

In the United States Court in the Indian Territory, at Muskogee, in the Northern District.

William L. Wilder, Plaintiff,
No. 1896. vs.
Missouri, Kansas & Texas Railway Company, Defendant.

STIPULATION FOR DISMISSAL.

It is hereby stipulated and agreed by and between the parties to the above entitled and numbered cause that the said cause, together with all matters involved therein, be, and are hereby fully and finally settled, and that this cause shall at once be finally dismissed, each party to pay its own costs, the plaintiff waiving any and all claims for damages sued upon in this cause.

WILLIAM T. HUTCHINGS,
Atty. for Plaintiff.
CLIFFORD L. JACKSON,
Atty. for Defendant.

United States of America, Indian Territory, Northern District. } ss.

I, Chas. A. Davidson, clerk of the District Court for the Northern District of the Indian Territory, do hereby certify the foregoing to be a true copy of

an order made by said court on the 2nd day of April, 1900, as appears from the records of said court now on file in my office.

In witness whereof, I have hereunto set my hand, at my office in Muskogee, in said District, this 8th day of May, A. D. 1900.

CHAS. A. DAVIDSON, Clerk,
By L. A. WINSTON, D. C.

EXHIBIT H.

COPY OF ORDER OF COURT.

United States of America,
Indian Territory,
Central District. } ss.

In the United States Court in the Indian Territory, Central District, at a term thereof begun and held at South McAlester, in the Indian Territory, on the 15th day of January, 1900. Present, the Honorable Wm. H. H. Clayton, Judge of said court.

The following order was made and entered of record, to wit: —

Orange Fuller,
Assignee of Butler Bros.,
No. 794. vs.
Missouri, Kansas, and Texas
Railway Company, } Complaint at Law.

Now at this day comes the above named defend-

ant, and in support of the fourth amended petition for a new trial in this case files certified copy of opinion of the United States Court of Appeals for the Indian Territory, in the case of Missouri, Kansas & Texas Railway Company, Appellant, versus William L. Wilder, Appellee, and the court having fully considered the said amended petition for a new trial in this case, which was heretofore continued by agreement between counsel, to this the December, 1899, term of this court, together with the evidence thereon, and the briefs of counsel, filed both in support of and in opposition to said amended petition for new trial, and the court having been fully advised in the premises finds that the original petition for new trial was filed on the twentieth day of April, 1896, in accordance with Section 5155 of Mansfield's Digest of the Statutes of Arkansas, extended over the Indian Territory by Act of Congress, May 2, 1890, and that summons was duly issued and served upon the plaintiff as required by said statute, and that the said plaintiff has duly entered his appearance in these proceedings, and filed answer to the original petition for new trial, as well as to the different amendments thereto, as such amendments have been based upon such additional evidence as the defendant alleges was discovered subsequent to the filing of the original petition for new trial and amended petitions for new trial respectively, and the court further finds that the evidence fully sustains the said petition for new trial, and that under the statute hereinabove referred to, and in view of the opinion of the United States Court

of Appeals for the Indian Territory, in the case of the Missouri, Kansas & Texas Railway Company, Appellant, vs. William L. Wilder, Appellee, a companion case to this, that said petition should be sustained.

Wherefore the court orders that the said petition be sustained and a new trial granted.

United States of America,
Indian Territory,
Central District. } ss.

I, E. J. Fannin, Clerk of the District Court of the United States for the Central District of the Indian Territory, do hereby certify the foregoing to be a true copy of an order made by said Court on the 15th day of January, 1900, as appears from the records of said Court now on file in my office.

In testimony whereof, I have hereunto set my hand, at my office in South McAlester, in said District, this 28th day of April, A. D. 1900.

E. J. FANNIN,
Clerk.

By I. M. DODGE,
Deputy.

No. 7 Orig.

By. of Hagerman, Jackson & Bryson for Respondent

Off... Supreme Court U.S.
FILED
DEC 13 1900
JAMES H. MCKENNEY
Clerk.

Filed Dec. 13, 1900.

Supreme Court of the United States.

No. 7.

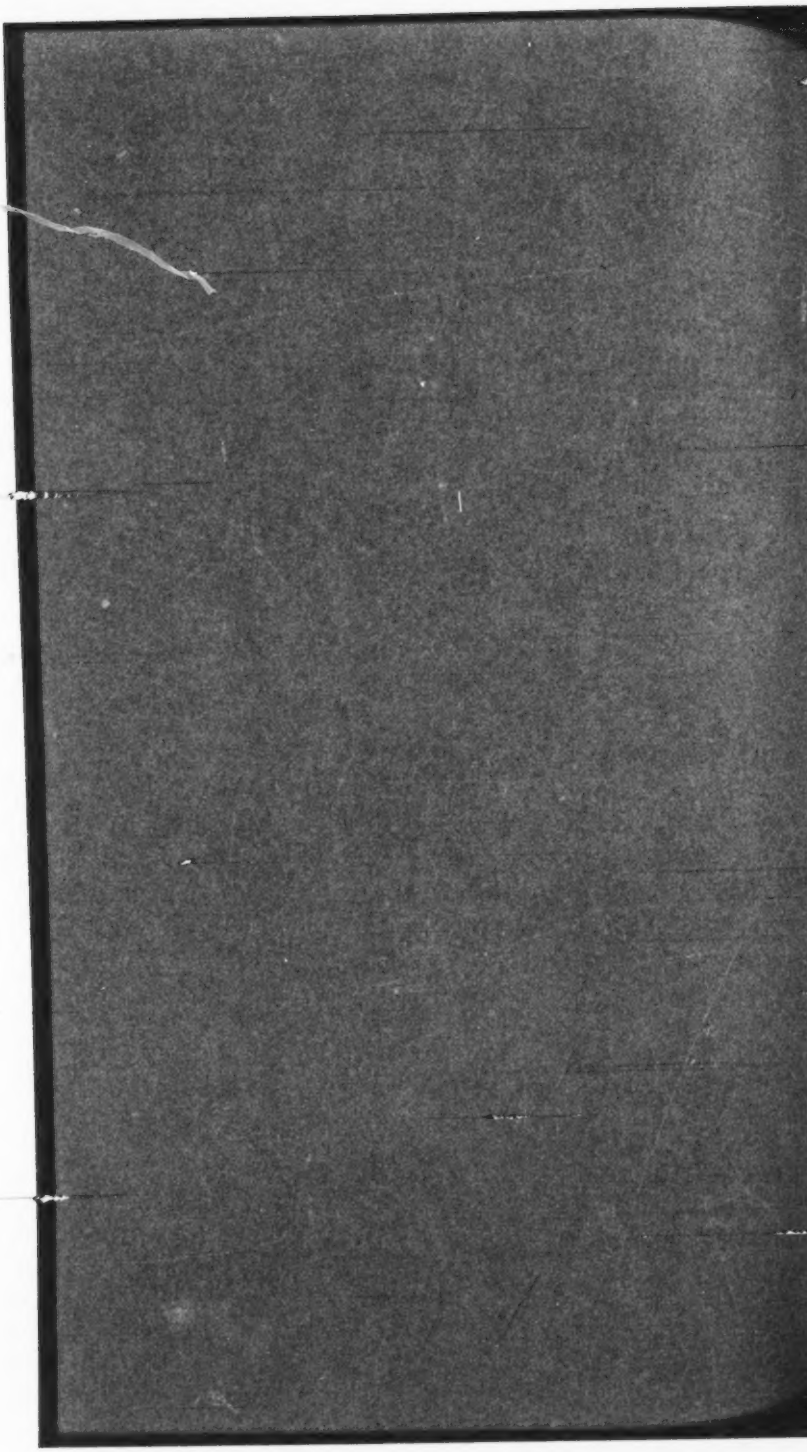
ORIGINAL O. T. 1900.

EX-PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

Brief on behalf of Respondent, William H. H. Clayton, Judge of United States Court in Indian Territory in Opposition to Demurrer to Return of Respondent.

JAMES HAGERMAN,
CLIFFORD L. JACKSON,
JOSEPH M. BRYSON.
Attorneys for Respondent.

Nixon-Jones Printing Co., 310 Pine St., St. Louis.



Supreme Court of the United States.

No. 7.

ORIGINAL O. T. 1900

EX-PARTE ORANGE FULLER, AS ASSIGNEE OF MANNY G. BUTLER AND ROBERT E. BUTLER, COMPOSING THE FIRM OF BUTLER BROTHERS, PETITIONER.

Brief on behalf of Respondent, William H. H. Clayton, Judge of United States Court in Indian Territory in Opposition to Demurrer to Return of Respondent.

STATEMENT.

This proceeding involves a judgment in one of five companion cases brought to recover damages growing out of a fire, alleged to have been set out by a locomotive engine operated upon the line of the Mis-

souri, Kansas & Texas Railway Company in the Indian Territory. The history of the litigation, so far as it is necessary to be stated in connection with this proceeding, is set forth in a brief way in the return of the respondent, to which the attention of this Court is respectfully directed. The judgment in controversy in this proceeding, which is known as the Fuller Case, was the first one rendered in any of these five cases; it was in favor of Orange Fuller, as assignee of Butler Brothers, and against the railway company for damages in the sum of $8,500.00 on account of property destroyed by the fire referred to. A writ of error was sued out from the United States Circuit Court of Appeals for the Eighth Circuit and the case taken there for review; the judgment of the United States District Court was affirmed by the said Circuit Court of Appeals (72 Fed. 467), and a writ of error from this Court was sued out and the case brought to this Court for review, and it bore number 16,236 upon the docket of this Court and number 146 upon the docket of the October, 1897, term of this Court, and was here affirmed by a divided court (168 U. S. 707).

While the case was pending in this Court on writ of error, the second of these five companion cases, known as the *Wilder Case*, was tried in the United States District Court for the Northern District of the Indian Territory, and at that trial a lot of new evidence was developed which materially affected the issues in the case and the jury disagreed. That case was subsequently tried on two other occasions in the United States District Court while the Fuller

Case was still pending in this Court, and a judgment was finally rendered in favor of the plaintiff, which judgment was later reversed by the United States Court of Appeals for the Indian Territory, which said Court of Appeals was not in existence when the judgment in the *Fuller Case* which is in controversy in this mandamns proceeding was rendered. The opinion of the United States Court of Appeals for the Indian Territory in the case of Missouri, Kansas & Texas Railway Company v. Wilder, is reported in 53 S. W. Rep., 490.

Upon the reversal of the *Wilder Case* the plaintiffs in it and the other three companion cases abandoned any further claim for damages and dismissed all four of the cases (Exhibits A, B, C, D, E, F, G, H, Return of Respondent).

When this new evidence developed, and while this case was so pending in this Court on said writ of error, a petition for new trial was filed in the *Fuller Case* in the lower court *within the time fixed and* in *accordance with* Section 5155 of Mansfield's Digest of the Statutes of Arkansas, adopted by Act of Congress of May 2, 1890, for the government of the United States Court in the Indian Territory, which said Act of Congress is entitled, "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes."

By reason of the said additional trials of the *Wilder Case* other new evidence developed at different times which was made a part of said petition for new

trial in the Fuller Case by amended petitions subsequently filed.

The facts with reference to the proceedings for a new trial are substantially correct as set out in the brief of counsel for the petitioner herein.

ARGUMENT.

The United States Court in the Indian Territory had jurisdiction to consider and determine the petition for new trial.

For the purposes of this case, jurisdiction may be defined to be the power to hear and determine the petition for a new trial under the act of Congress relied on.

On May 2, 1890, an act of Congress was adopted, entitled, "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States Court in the Indian Territory, and for other purposes." Section 31 of said act of Congress, so far as it affects the matters at issue in this proceeding, is as follows: —

> "Sec. 31. That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that State of eighteen hundred and eighty-three, as published in eighteen hundred and eighty-four in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating * * * to pleadings and practice, chapter 119."

U. S. Stat. at Large, Vol. 26, p. 94.

Among other sections found in chapter one hundred and nineteen of Mansfield's Digest of the Statutes of Arkansas governing the procedure relating to new trials is the following: —

> "Sec. 5155. Where grounds for new trial are discovered *after the term* at which the verdict or decision was rendered, the application may be made by *petition filed with the clerk*, not later than the second term after the discovery, *on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term.* The application shall *stand for hearing at the term to which the summons is returned executed*, and shall be summarily decided by the court. *The evidence may either be by depositions or by witnesses examined in court.* But no such application shall be made more than three years after the final judgment was rendered."

In all of the cases cited by counsel for petitioner no statute like this or similar to it was referred to or considered, and it is therefore respectfully submitted that such cases do not apply to the present proceeding.

A statute very similar to this, however, was construed by this Court in the case of Ex parte Russell, 13 Wall. 664, and in the case of Ex parte United States, 16 Wall. 699, where this Court held that the trial court could grant a new trial notwithstanding the mandate of this Court had been issued affirming the judgment of the trial court.

The statute there under consideration is found in the Act of Congress of June 25, 1868, 15 U. S.

Stat. at large, p. 75, the second section of which is as follows:—

> "Sec. 2. And be it further enacted, that said court of claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any such suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or otherwise) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

In the two cases last above cited this Court held that because of the provisions of the statute referred to that the Court of Claims was not bound by the rule which the counsel for petitioner seeks to invoke in this proceeding, and that the Court of Claims has jurisdiction to entertain and determine proceedings for new trials founded on newly discovered evidence without leave of this Court notwithstanding such cases may be pending in this Court on appeal, or have been decided by this Court and its mandates sent down to the said Court of Claims, and it is respectfully submitted that the same construction must be given to the Act of Congress relating to the United States Court for the Indian Territory. There are numerous States in the Union where statutes like this Arkansas statute are in

force; one of these is the State of Iowa, which has a statute as follows: —

> "Where the grounds for a new trial could not with reasonable diligence have been discovered before, but were discovered *after the term* at which the verdict, report of referee or decision was rendered or made, the application may be made *by petition filed, as in other cases, not later than the second* term after the decision on which notice shall *be served* and returned and the defendant held to *appear as in an original action.* The facts stated in the petition shall be considered as denied without answer. *The case should be tried as other cases,* by ordinary proceedings, but no petition shall be filed more than one year after the final judgment was rendered."

This statute was passed upon by the Supreme Court of Iowa in the case of Cook v. Smith et al., 58 Iowa, 607 (12 N. W. Rep. 617). In this case a judgment had been rendered against the defendant and an appeal taken from the Circuit Court to the Supreme Court, and while the appeal was pending the defendant discovered new evidence and filed a petition in accordance with the Iowa statute and just as the petition was filed in the case at bar in the United States Court for the Indian Territory under these Arkansas and United States statutes. An answer to such petition was filed as in this case pleading the pending appeal as a bar to the proceedings for new trial. The said Circuit Court of

Iowa sustained a demurrer to such answer and thereafter the original case was finally affirmed on appeal in the Supreme Court of Iowa and the petition for new trial subsequently brought to a hearing as was done in the case at bar.

In its opinion the Iowa Supreme Court used the following language: —

"The statute provides, where grounds for new trial cannot, with reasonable diligence, be discovered before, and are discovered after, the term at which the trial was had, an application therefor may be made by petition filed not later than the second term after the discovery; but no petition shall be filed more than one year after final judgment is rendered.

"When the petition for a new trial was filed the Circuit Court, without doubt, had jurisdiction and the power to grant a new trial upon the ground material evidence had been discovered since the trial. Did the subsequent appeal oust the Circuit Court of such jurisdiction? There is no statute which so provides. The right to apply for and the power of the court to entertain jurisdiction of the application during the time limited in the statute is absolute and unconditional. There is no such inconsistency between the two proceedings as to require the one to be abated because the other is pending. It may be both should not be actively prosecuted at the same time for determination; the determination of one may render a decision in the other unnecessary. Upon application this would no doubt be controlled by the courts. Suppose the ground upon which a new trial was asked was not discovered until after the appeal was taken on the last day allowed therefor, would such appeal de-

prive the court of the power to entertain jurisdiction of a petition for a new trial? Clearly not, we think; for during the time limited in the statute the power of the court and the right of the party is unconditional. There are cases where neither party is satisfied with the judgment below. Would an appeal by one party oust the court of the power to entertain and grant a new trial on the application of the other party? We think not."

A similar rule has been laid down by the appellate courts of New York under somewhat similar statutes. In the case of Henry v. Allen the Court of Appeals held that the fact that an appeal had been taken and was pending, did not prevent a motion being made in the trial court for a new trial on the ground of newly discovered evidence, and that while in all matters pertaining to the appeal itself, and to the proper hearing thereon, the appellate court had jurisdiction, yet as to an application or a motion for new trial, the case was still pending in the court of original jurisdiction and such application should be made to that court and not the appellate court. If the lower court sustained the motion and granted the trial, the legal effect would be the vacating of the judgment from which the appeal has been taken to the appellate court, and a motion to dismiss the appeal would then be proper.

Henry v. Allen, Court of Appeals, New York, 41 N. E., 694.

At the time this case was heard Mr. Justice Peck-

ham was a member of that court and concurred in the opinion.

In Voisin v. Commercial Mutual Ins. Co., 56 Hun, 215, it is held that the trial court may grant a motion for a new trial although final judgment may have been entered, the time to appeal therefrom expired and the judgment itself may have been enforced. This case went to the Court of Appeals of New York (123 N. Y. 120), and was affirmed. The Court of Appeals in its opinion reviewed the legislation of New York covering new trials at length, and as the statutes involved are quite numerous and set out in the opinion we will not here insert them. And however "anomalous" the result arrived at (to borrow the language of this Court in *U. S.* v. *Young*, 94 U. S. 258), that court said, page 123:—

> "It is undoubtedly competent for the legislature to limit the effect of a judgment as respects the right and mode of granting relief to an aggrieved party from any of the proceedings in the action, and where it has indicated a clear intention to protect the right of review from the effect of such judgment it is the duty of the court to give effect to the legislative intention."

So it appears to us in the case at bar, that it is the duty of this Court to give effect to the intention of Congress whatever may be the result upon a judgment which has been affirmed by this Court. It is clearly the intention of Congress that a right to a new trial should exist without regard to any former judgment and without regard to whether or not it was subsequently affirmed by an

appellate court. The section of the Arkansas law extended over the Indian Territory is just as much an *Act* of *Congress* as though it had been set out *in haec verba* in the act itself, instead of by reference. The question presented is not one of State law but of Federal law.

In Keister v. Rankin, 34 App. Div. Rep. (N. Y.) 288 it was urged that it was too late to grant a new trial after an appeal and the affirmance of a judgment but it was held that

> "It is never too late to do justice."

The same rule is also found in the following cases: —

Vernier et al. v. Knauth et al., 39 N. Y. Sup., 784;
Smith v. Matthews et al., 47 N. Y. Sup., 96;
Stokes v. Stokes, 54 N. Y. Sup., 319;
Nugent v. Met. St. Ry. Co., 61 N. Y. Sup., 476.

A similar rule under a somewhat similar statute also exists in California. In the case of Naglee v. Spencer, 60 Cal., 10, the Supreme Court of that State said: —

> "An appeal from the judgment does not affect the jurisdiction of the lower court to hear and pass upon motion for new trial."

In the case of Rayner v. Jones, 90 Cal., 78, the Supreme Court of California also held that,

> "A notice of motion for a new trial was served

in due season, and upon the hearing of the motion the trial court dismissed it, upon the theory, evidently, that, as the judgment made and entered had been appealed from when the motion for a new trial came on for hearing, the court below had lost jurisdiction to determine it. This view of the matter is untenable, and the court should have heard the motion, and either granted or denied it, upon the bill of exceptions presented, which is a part of the record here on the appeal from the order of dismissal."

See also

Carpentier v. Williamson, 25 Cal. 167;
Chase v. Evoy, 58 Cal. 352;
McDonald v. McConkey, 57 Cal. 326.

This Arkansas statute, extended over the Indian Territory by Act of Congress, was construed by the Supreme Court of Arkansas in the case of Jacks v. Adair, 33 Ark. 161, and in the case of Hill v. Draper, 37 S. W. Rep. 574. In the case of *Jacks* v. *Adair*, it was held that the three-year period of time mentioned in the Arkansas statute above quoted, within which petitions for new trial might be filed, runs from the date of rendition of the judgment in the trial court and not from the rendition of the judgment in the Supreme Court in cases appealed to it, and it did not hold as counsel for petitioner contends that the proceedings in the appellate court must be dismissed before a petition for new trial could properly be filed in the trial court, but it is expressly held that the statute in question "extended to cases at law a new remedy" and "in

derogation of the common law principle that the judgments of the Circuit Court at law cannot be altered by the same court after the close of the term except by bill in chancery in a direct attack for fraud," and does not change the rule in equity as to bills of review.

Further it was said: "It has been well settled, however, that for matters arising after the judgment or decree of an appellate court which would render it inequitable to carry out the judgment or decree into execution it may be enjoined. That detracts nothing from the dignity or supremacy of the superior tribunal. *It presents new equities for original jurisdiction.*"

The case arose by writ of prohibition to the trial court where a motion for new trial had been filed as well as a bill in equity for an injunction, and the question of new trials at law under the statute was not discussed at length, as the case was really decided on the bill in equity. The paragraph of the opinion quoted in petitioner's original brief (p. 7) shows that the court did not undertake to decide that the pendency of an appeal *was* an obstacle to the lower court granting a new trial as stated in brief in support of demurrer to return of respondent, for the Court said: "The appeal is his own and creates the obstacle against filing the petition below *if any exists* pending the appeal." The pendency of the appeal was urged as an excuse for not filing the petition for new trial sooner. The paragraph of the court's opinion immediately preceding shows that the "*question whether the court below can entertain*

such a petition at all during the pendency of an appeal here and before the cause was remanded" was not considered. No mandate went to the lower court, but the case was retained in the Supreme Court for execution.

In the case of *Hill* v. *Draper*, *supra*, citing the case of *Jacks* v. *Adair*, *supra*, the Supreme Court of Arkansas said: —

> "In this case the Circuit Court treated a part of the decree of this court as of no effect, and upheld a sale which had been set aside by it *without any ground for review or new trial, there being no newly discovered evidence.*"

This clearly indicates that had there been grounds for a new trial on account of newly discovered evidence, and the statute in question had been invoked and a new trial granted, the action and judgment of the Supreme Court would have been entirely different.

The two opinions of this Court in *Ex parte* Russell, *supra*, and *Ex parte* United States, *supra*, as well as the decisions of those State courts where similar statutes exist, are confidently relied upon as conclusive in favor of the jurisdiction of the United States District Court in the Indian Territory to grant this new trial under the statute in question.

The counsel for petitioner cites certain opinions of this Court and other Federal courts in support of the general proposition that under the Federal prac-

tice when an appeal in equity is properly taken it removes the case and the decree therein from all supervision on the part of the court below. There is no question but that this is the correct rule as applied to the facts in those cases but it has no application in this proceeding because the foundation of the action of the United States District Court is a statute expressly authorizing the institution of a new suit or new trial without regard to any appeal or affirmance of the court's former judgment similar to the Court of Claims Act.

There is an important and controlling distinction between the filing of a motion for a new trial during the *same term* at which judgment is rendered under ordinary statutes which are found in most of the States, and the proceeding had in the lower court in this cause under Section 5155 of the Arkansas statutes extended over the Indian Territory by the act of Congress. By the same act of Congress there was also extended over the Indian Territory Sections 5153 and 5154 of the Arkansas statutes, which read as follows: —

> "Sec. 5153. The application for a new trial must be *made at the term the verdict or decision is rendered*, and, except for the cause mentioned in subdivision seven, of section 5151, shall be *within three days after the verdict* or decision was rendered, unless unavoidably prevented."

> "Sec. 5154. The application must be made by *motion*, upon written grounds, filed at the time of making the motion. The grounds mentioned in the

second, third and seventh subdivisions of section 5151 *must be sustained by affidavits* showing their truth, and may be controverted by *affidavits.*"

These two sections cover the ordinary *motion* for a new trial made at the same term. While Section 5155 provides for the granting of a new trial *after the term* at which the verdict or decision was rendered, upon *petition filed with the clerk as in other complaints, requiring the adverse party to appear and answer it on or before the next term*, and to be determined by *depositions or by witnesses examined in Court.* In a word, this latter section provides for an independent trial. Under Sections 5153 and 5154 the *motion* for a new trial is determined simply on *affidavits.* It may be conceded that had the application for the new trial been made under Sections 5153 and 5154 that the trial Court could not have acted upon or granted the same pending the appeal to this Court or the intermediate appellate court; but the reverse of this proposition is equally clear under Section 5155.

The line of distinction between these sections is clearly pointed out by this Court in its decisions construing the Court of Claims Act. The same line of distinction has been drawn in all of the States (and there are a number of them) where similar statutes exist granting the right of a new trial after the term at which the judgment or decision is rendered. This question is quite fully discussed in the Encyclopedia of Pleading and Practice, Vol. 14, Title, New Trial, where, after dis-

cussing the ordinary motion at term time, it is said (p. 949): —

> "The codes provide in substance that when the grounds for a new trial could not with reasonable diligence have been discovered before but are discovered *after the term* at which the judgment is entered, the application may be by *petition filed as in other cases.* The remedy thus provided is in the nature of a bill in equity for a new trial on the ground of newly discovered evidence, and supersedes such remedy."

And further along it is said in this work that (p. 953):—

> "The codes generally provide that the *petition* for "new trial must be made not later than the *second* "*term after the discovery* of the ground for the new "trial, and not later than *one, two or three* years after "the judgment attacked, otherwise the petition will "be dismissed. *The petition may be filed pending an* "*appeal.*"

It is further shown by the text in this work that upon a petition being filed under a statute of this kind, the court procedes as in ordinary cases, process issues, service made a demurrer may be filed, an answer may be filed, and a hearing had upon testimony in open court. In none of these particulars is a proceeding of this kind in any way akin to the ordinary motion of a new trial filed at the same term at which the judgment or decision is rendered.

The distinction is more clearly shown between

these two forms of proceeding by the fact that where a new trial is refused or granted *after term time* under a statute of this kind, an appeal lies; but where the ordinary motion for a new trial at the same term is refused or granted, no appeal lies from the decision of the court thereon. In the one case it is a final decision of a cause, and in the other, the mere discretionary action of the Court upon an interlocutory motion.

In Nebraska, there are similar statutes to the Arkansas law, extended over the Indian Territory as aforesaid by act of Congress, and it is held that an order setting aside a verdict of the jury and granting a new trial during the term at which the verdict is returned and before judgment, is not a final order and is not reviewable by proceedings in error (Artman v. West Point Mfg. Co., 16 Neb. 572); while, on the contrary, it has been repeatedly held in that State that error will lie from a judgment granting a new trial on proceedings commenced after the adjournment of the term on the ground of newly discovered evidence. Iler v. Darnell, 5 Neb. 192; Axtell v. Warden, 7 Neb. 186; Kruger v. Adams, 9 Neb. 526; Johnson v. Parrotte, 34 Neb. 26.

A similar distinction has been made in Indiana, where new trials may be granted either at term time or thereafter, as under the Arkansas law. In Hines v. Driver, 89 Ind. 339, the Supreme Court said: —

> "Much of the apparent conflict between the cases referred to in argument has arisen from a failure

to observe the essential difference between an application for a *new trial made during the term* and an *independent proceeding* to obtain *a new trial instituted after the close of the term*. In the first case the order which disposes of the application is only an interlocutory order, subject to the control of the court until final judgment and only capable of being reviewed in connection with other proceedings in a cause in which it is made. In the latter case the proceeding being an independent one and having but a single object in view, the order which makes a final disposition of the cause is necessarily a final order and hence a final judgment within the meaning of section 632 of the civil code."

The ordinary motion for new trial at term time rests in the sound discretion of the court and is not subject to review. Armstrong v. State, 54 Ark. 364.

But it is clear under the decisions above that an appeal lies from the judgment or order on a *petition* for new trial under the statute in question.

In First Nat'l Bank v. Murdough, 40 Ia., 26, the same distinction is made between *motions* for new trials at term time and *petition* therefor after term time — the latter being an independent action.

In Sanders v. Loy, 45 Ind. 229 (approved in Kitch v. Oatis, 79 Ind. 96), it is said: —

"The application (for new trial), *when made after judgment and at a subsequent term of the court, must, as we have seen, be regarded as an independent proceeding*, and must set out the issues upon the former

trial and the evidence given on such trial, with the newly discovered evidence. *An issue must be formed on the complaint, and the issue thus formed must be tried by the court.* Upon such trial the plaintiff should introduce in evidence the record of the former trial, prove what the evidence was upon such trial, the newly discovered evidence, and show that it had been discovered since the term when the case was formerly tried, and what diligence he had used to discover the evidence before the former trial. The defendant should in like manner introduce his evidence orally before the court. If the new trial is refused, the party appealing to this court should put into the record by a bill of exceptions all the evidence, documentary and oral, which was offered and considered by the court in the application for a new trial."

Section 572, Statutes of Indiana (Burns, 1894) is substantially like the statute in question. Preceding sections provide the usual grounds for new trials at same term and this section covers new trials after term.

In Sanders v. Loy, 45 Ind. 230, *supra*, new trials *after term* are strikingly distinguished from those at term. It is said: —

"When the application is made after the term by a complaint the proceeding is a new and independent one and cannot be fastened on the former proceedings which had already resulted in a judgment and was no longer pending in court."

In Harry v. Fink, 111 Ind. 254, it is said that a

complaint for a new trial under statutes of this kind "*constitute a separate and distinct action* and the ultimate result reached through such proceedings constitute a final judgment from which an appeal may be prosecuted to this court."

The distinction between new trials at term time and those granted after term time is nowhere more clearly drawn than in Hill v. Roach, 72 Ind. 58, where that court said: —

> "It is unquestionably true that in this State a complaint for the review of a judgment for error of law in the proceedings will not lie after the judgment has been affirmed upon an appeal to this court, but we know of nothing either in principle or based upon authority which can be properly construed to prevent the prosecution of a complaint for review as in this case for material new matter after the judgment has been affirmed by this court upon an appeal involving only supposed errors of law in the proceeding below provided the *complaint* is filed within the time limited for the commencement of such action. Davis *v.* Binford, 70 Ind. 44; Indiana Ins. Co. *v.* Routledge, 7 Ind. 25; Southard *v.* Russell, 16 How. 547, 570; Kinsell *v.* Feldman, 28 Iowa, 497; Stafford *v.* Bryan, 2 Paige, 45; Dennison *v.* Goehring, 6 Pa. St. 402."

The Nebraska statute above referred to is very similar to the statute in question (§ 4839, Consolidated Statutes of Neb., 1893, Cobbey), and the lower court can grant a new trial, notwithstanding the affirmance of its original judgment on appeal. O. N. & B. H. Ry. v. O'Donnell, 24 Neb. 753.

In Kentucky there is a statute exactly like the

Arkansas statute, except that there is a proviso in Kentucky law that it shall not apply to divorce cases (§ 343, Kentucky Code, 1888, Carroll). We think it clear that the Kentucky statute was adopted by Arkansas (Jacks v. Adair, *ubi supra*), and under the Kentucky statute trial courts grant new trials, notwithstanding appeal and affirmance of former judgment.

Scott v. Scott, 82 Ky. 328.

L. & M. Ry. v. Whitley County Court, 38 S. W. 678.

In Ohio there is a statute exactly like the Arkansas statute (Sec. 5309, Bates Anno. Stats. 1897).

In Moores v. Coates, 35 Ohio St. 185, it is said:—

"A party may obtain a new trial upon *motion* but the motion must be filed *during* and not after the term at which the verdict, report or decision is rendered. Civil Code, § 299. Where the grounds are discovered subsequently to the term when the verdict, report, * * * or decision was * * * rendered" relief can only be had by *petition*, § 301. A *motion*, ordinarily in the briefest terms, may be and usually is heard in a summary manner upon ex parte affidavits, while a *petition* is a substitute for the remedy by bill in equity for a new trial on the grounds of newly discovered evidence (Stevens *v.* Hey, 15 Ohio, 313; Brown *v.* Luehrs, 79 Ill. 575; Hilliard on New Trial, 2d ed. 604; 2 Nash's Pr. 1048) though on the one hand the remedy is broader than by bill in equity and on the other hand, section 301 may not provide for all the cases in which relief may be had where the principal ground is newly discovered evidence."

In Myers v. Myers, 6 Oh. St. 227, it is held that petition should be filed in trial court and that no *permission* from court is necessary — that it is a matter of right under the statute.

In Kansas* there is a statute exactly like the statute in question (§ 310, Civil Code, R. S. Kan. 1897), and in that State the lower courts grant new trials though their former judgments have been affirmed by the Supreme Court.

Soper v. Medbury, 24 Kan. 135;
Gottleib v. Jasper & Co., 27 Kan. 773.

In the latter case the distinction between *motions* for new trials at same term and *petition* for new trial *after term* time is clearly drawn and Sanders v. Loy, 45 Ind. 229, and Moore v. Coates, 35 Oh. St. followed and held that

> "This petition for a new trial although instituted
> "merely for the purpose of obtaining a new trial in
> "an action to which it is merely an incident may also
> "in one sense be called an action itself and a new and
> "independent action and so far as it is a new and in-
> "dependent action we suppose it should be governed
> "by the rules of procedure governing other actions."

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* Where the grounds for a new trial could not with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report of referee or decision was rendered or made, the application may be made by petition, filed as in other cases, not later than the second term after discovery; on which a summons shall issue, be returnable and served, or publication made, as prescribed in section seventy-four. The facts stated in the petition shall be considered as denied without answer, and if the service shall be complete in vacation, the case shall be heard and summarily decided at the ensuing term, and if in term, it shall be heard and decided after the expiration of twenty days from such service. The case shall be placed on the trial docket, and the witnesses shall be examined in open court, or their depositions taken as in other cases; but no such petition shall be filed more than one year after the final judgment was rendered. (§ 310 Kan. Civ. Code.)

The statutes of Indiana, Ohio, Kentucky, Iowa, and Nebraska above referred to are one and all like this Arkansas statute and this Kansas statute. They differ only in the time limitation. Some provide *one* others *two* and others *three* years after final judgment as the limit for filing of such petitions.

This case also holds that an appeal lies from order or judgment on such a petition while in Kansas as elsewhere the court's action on an ordinary motion at term time is a matter of sound discretion and not reviewable.

These cases were followed by the Supreme Court of Kansas during the time Mr. Justice Brewer was a member of that court.

Conroy v. Perry, 26 Kan. 473;
Sexton v. Lamb, 27 Kan. 432;
Duffitt v. Crozier, Judge, 30 Kan. 150.

In the former two the opinions were written by Mr. Justice Brewer, and in the latter case he wrote a concurring opinion. In all of them it is held that under the Kansas statute the trial court can grant a new trial on grounds of newly discovered evidence, notwithstanding the affirmance of its former judgment on appeal, and in the latter it is expressly held that no application to the Supreme Court for leave to file is necessary. In the course of that opinion Judge Brewer said: —

"I see no reason to doubt the power (to grant "a new trial), neither do I understand my associ- "ates as questioning its existence. In a certain sense "the judgment in this court is an end of the liti- "gation. So, also, it may be said that any judg- "ment is an end of the litigation. It is a finality, "and yet not absolutely final. Take a judgment "in the District Court (trial court), when it "is once entered there is said to be a final "adjudication. Neither party can come into court "and by simply saying he has more or differ-

"ent testimony have the judgment set aside "and the matters in issue relitigated. The reply to "such an application would be, you are too late — the "matter is at an end. And yet every lawyer knows "that such a judgment is not absolutely final even in "that court. By motion or petition a reinvestigation "may be had within days or even months thereafter "and the statute provides within what time and upon "what conditions such further relief may be had. "(Civil Code, §§ 306–310; Sexton *v.* Lamb, 27 Kan. "432.) Now I suppose that when a mandate goes "back from this court directing the entry of a judg- "ment the judgment should be entered in conformity "therewith. *But even then* upon proper petition and "showing further proceedings may be had, the judg- "ment opened up and the issues relitigated. But this "cannot be done upon the mere application of a party. "That would make the judgment of the appellate less "of a finality than that of a trial court. There must "be a showing of new facts or newly discovered "testimony such as would make an opening up of "the judgment and a re-examination justifiable and "such application must in the first instance be made "to the District and not to this court."

In the first appeal of this case (Duffitt v. Tuhan, 28 Kan. 292) a mandate of the Supreme Court was sent to the court below directing it to enter judgment upon the findings of fact in favor of the plaintiff. Plaintiff presented the mandate and asked that judgment be entered accordingly but the defendant moved for a new trial.

In Wisconsin a very similar statute was before the court in the case of State ex rel. Turner v. Circuit Court of Ozaukee County, 71 Wis. 595, and it

was held that the trial court could grant a new trial notwithstanding the affirmance of its former judgment in the Supreme Court of that State. It was held:—

"The town of Saukville was indicted for not repairing a bridge, and was found guilty. A motion was made to set aside the verdict, and for a new trial, which motion was denied, and the defendant town was sentenced to pay a fine of $250. The cause was then brought to this court on a writ of error, and the judgment of the Circuit Court was affirmed. On the return of the record to the Circuit Court, the defendant made a motion, founded upon a petition and affidavits for a new trial, which motion was granted. A common-law writ of *certiorari* was then issued from this court to review the order of the Circuit Court granting a new trial. A motion is now made to quash the writ because it was improvidently granted, and that motion is the matter to be considered. The rule is well settled in this court that the only question arising on the motion is the question of jurisdiction. Where the writ issues to review the proceedings of a court, that is the only question which will be examined, though it is otherwise when it issues to review the proceedings of officers or bodies not proceeding according to the common law. It is not necessary to cite our decisions where these principles have been adjudicated and settled. Had, then, the Circuit Court power or jurisdiction to grant a new trial in this cause? For the purposes of the case, jurisdiction may be defined to be the power to hear and determine the cause or controversy before the court, or the power to grant the motion for a new trial. See Wanzer *v.* Howland, 10 Wis. 16; Pollard *v.* Wegener, 13 Wis. 510; Arnold *v.* Booth, 14 Wis. 180; Hauser *v.* State

33 Wis. 678. Section 4719, Rev. St., reads as follows: 'The Circuit Court may at the term in which the trial of any indictment or information shall be had, *or within one year thereafter, and in either case, before or after judgment*, on the petition or motion in writing of the defendant, grant a new trial for any cause, for which by law a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms as the court may direct.' It appears that a proper motion was made *within one year from the judgment*, upon the grounds addressed to the discretion of the Circuit Court, and a new trial was undoubtedly granted under the special authority conferred by the above statute; and the question now is, had the court power to grant it? *We can only consider the question of the power or jurisdiction of the court in the matter, not whether it exercised that power wisely or granted the motion on insufficient grounds, for the court may have erred, but error does not affect its jurisdiction.* This statute was probably borrowed from Massachusetts. See Rev. St. Mass. 1882, c. 114, § 128; Com. *v.* Peck, 1 Metc. 428; Com. *v.* McElhaney, 111 Mass. 439; Com. *v.* Scott, 123 Mass. 418. Also Ter. St. Wis., p. 377, § 6; Rev. St. 1849, § 6, c. 149; Rev. St. 1858, § 6, c. 180. *We do not well see upon what grounds the power of the court to grant the new trial can be denied if the provision is valid. The fact that the judgment has been affirmed by this court furnishes no sufficient reason for denying that power. It is said by the affirmance of the judgment it became a finality, a final determination of the cause and sentence of the law. That view would certainly be correct had not the legislature conferred this special authority to grant a new trial upon a proper cause shown.* On affirmance of a judgment in a civil case no new trial could be granted unless the statute authorized it. It is only

where the statute does authorize it can a new trial after affirmance be granted, either in a civil or criminal cause. In actions of ejectment the court can grant a new trial even after affirmance by this court, and this by virtue of a statute upon the subject. Haseltine *v.* Simpson, 61 Wis. 427; 21 N. W. Rep. 299. Consequently we can perceive of no sufficient grounds or reasons for denying the validity of the statute to grant a new trial after judgment has been affirmed in this court, any more in a criminal than in a civil cause."

It will be noted from the cases cited that a similar decision was made in Massachusetts under a like statute, the opinion having been written by Chief Justice Shaw. Com. v. McElhaney, 111 Mass. 439.

It is argued by counsel for petitioner that where a decree in equity has been affirmed on appeal a bill of review on grounds of newly discovered evidence can only be filed by leave of the appellate court and that therefore such a practice must govern the granting of new trials at law under the statute in question. We submit that such an argument is not even persuasive, much less controlling. That statute is clear and simple and contemplates no such action. It confers the right without let or hindrance — it is a statutory grant. As said by the courts of Ohio, it is a matter of right and not of leave. It is a new suit, begun as other *actions*, by the filing of a petition, service of summons on the defendant, filing of answer or other plea, a hearing upon testimony in open court, etc. It grows out of the former suit, it is true, but is entirely independent thereof. The meaning of the statute clearly is that the

lower court has lost jurisdiction of the original cause and of the parties with the expiration of the term of court at which the judgment was rendered; that the judgment whether unappealed from or affirmed is a finality so far as that suit is concerned and neither the lower court nor the appellate court have longer any control of that cause or the parties. The lower court cannot change its former judgment whether unappealed from or affirmed, and only regains jurisdiction of the parties by the filing of a new suit and the issuance and service of its process.

The practice in equity in Arkansas and in nearly all the other State courts is not as stated by the opposing counsel. The prevailing practice being for the *trial court* and not the *appellate* court to grant leave to file bills of review on grounds of newly discovered evidence.

Webster v. Diamond, 36 Ark. 538;
Jacks v. Adair, 33 Ark. 161;
3 Am. & Eng. Ency. P. & Pr. 574.

It is true that in the Federal courts the practice, founded on a *dictum* in Southard v. Russell, 16 How. 547, has generally been the reverse. That *dictum* was apparently based on a misapprehension of the English rule.

Putnam v. Clark, 35 N. J. Eq. 145;
Story Eq. Pl. 418;
Mit. & Tyler Eq. Pl. & Pr. 781;
Adams Eq. 416.

In Putnam v. Clark, 35 N. J. Eq. 145, it was held: —

"This is an application to this Court, by petition, "for leave to file a bill of review on the ground of "newly discovered facts, in a cause which was decided "here in 1880, on appeal from the final decree of the "Chancellor dismissing the complainant's bill. By "the decree of this Court that decree was affirmed and "the record remitted. There is, therefore, no record "here now. In my judgment, the application cannot "be entertained in this Court, but must be made in "the Court of Chancery. It is urged, however, that "in Jewett *v.* Dringer, 4 Stew. Eq. 586, where such "an application, on the ground of fraud and newly "discovered evidence, was made to that Court after "reversal of the decree on appeal, it was held that it "would not entertain an application to file a bill of "review, to revise its decision after that decision had "been passed upon by this Court. That view has, "indeed, the countenance of the opinion of Chancellor "Walworth, in Stafford *v.* Bryan, 2 Paige, 45, a case "cited in the vice-chancellor's opinion in Jewett *v.* "Dringer, and of the Supreme Court of the United "States in Southard *v.* Russell, 16 How. 547. In the "latter case, the Court distinctly said that a bill of "review will not lie in the case of newly discovered "evidence after the publication or decree where a "decision has taken place on appeal, unless the right "is reserved in the decree of the Appellate Court, or "permission be given on an application to that Court, "directly, for the purpose. But it will be found "that those decisions have neither the authority of "the books, nor of adjudged cases for their support. "The court of chancery has inherent power, without

" the consent of the appellate tribunal, to review, on
" the ground of newly-discovered evidence, its decree,
" though it has been passed upon on appeal, and no
" principle or practice requires that it shall refrain from
" doing so until the consent or countenance of the superior
" court shall have been obtained. These propositions
" are established by the following citations: Needles
" *v.* Kendall, Cas. temp. Finch, 468; Mitf. Pl. 88;
" Cooper's Pl. 92; 2 Dan. Ch. Pr. 1579; Story Eq.
" Pl. §§ 408, 418; 2 Hoff. Ch. Pr. 12; Tommey *v.*
" White, 1 H. of L. Cas. 160; Flower *v.* Lloyd, L. R.
" (6 Ch. Div.) 227; Haskell *v.* Raoul, 1 McCord's
" Ch. 22; Perkins *v.* Lang, reported in a note to that
" case, and McCall *v.* Graham, 1 Hen. & Munf. 13.
" It must be borne in mind that there is a distinction
" in practice between an application for a review on
" the ground of error on the face of the decree, and
" one based on newly-discovered evidence. In the
" former, no bill of review can be filed after the de-
" cree has been passed upon by the appellate tribunal,
" but in the latter it is otherwise. 'Where a decree,'
" says Judge Story, 'has been affirmed in parliament,
" it may well be doubted whether a bill of review for
" errors, apparent upon the face of the decree, can
" be brought; for the highest appellate court has pro-
" nounced, in effect, that it is not erroneous. The
" same objection does not apply where the bill of review
" is for matter of newly-discovered evidence.' In the
" ancient case of Needles *v.* Kendall, cited above, there
" was a bill of review, apparently for newly-discovered
" facts, after a decision of the cause on appeal, and it is
" evident, from the report, that no leave of the appel-
" late court was deemed necessary. In the recent case
" of Flower *v.* Lloyd, L. R. (6 Ch. Div.) 297 (1877),
" the plaintiffs obtained a judgment which was reversed

"on appeal.' After the order on appeal was passed "and entered, the plaintiffs applied to the appellate "court to have the appeal reheard with new evidence. "It was held that that court had no jurisdiction to "rehear the appeal. Sir George Jessel, M. R., "speaking on the subject of the practice, said, "'There was another totally different class of cases, "where you discovered subsequent matter which "showed that the decree was wrong, although there "had been no fraud in obtaining it. That was called a "supplemental bill, in the nature of a bill of review, "which brought the new matter forward, and again "enabled the court to do justice and get rid of the "original decree. That always required leave. Now, "that being so, supposing the court of appeal has no "jurisdiction to do what it now asked, there would "be means of obtaining justice by an original action, "which either would or would not require the leave of "the court according to circumstances. But the leave "to be given when required, was always to be ob- "tained from the court in which the bill was filed, or "in which the action had been brought.' As before "stated, it was held in that case that the appellate "tribunal (the Court of Appeal, under the judicature "act) having once determined the appeal, had no "further jurisdiction.

* * * * * * * * * *

"Upon the two cases above mentioned as holding "the contrary doctrine, Stafford *v.* Bryan, decided by "Chancellor Walworth, and Southard *v.* Russell, de- "cided by the Supreme Court of the United States, it "may be remarked that in the first, the bill was dis- "missed and the complainant appealed. Pending the "appeal, he, having obtained newly-discovered evi- "dence, applied to the appellate court to stay the

"hearing in that court until he could apply to the "court below for leave to file a supplemental bill in "the nature of a bill of review, to obtain the benefit "of the newly-discovered evidence. This was refused "and the decree affirmed. On the filing of the "*remittitur*, the motion for leave to file a bill of review "was made in the court of chancery, so that the very "application passed upon in the court below had been "unsuccessfully made in the court of appeal. In the "*other case no objection was made by counsel, on the* "*ground that the bill of review had been filed without* "*leave of the appellate tribunal, but that objection was* "*suggested by the court itself, after it had disposed* "*of the cause on the merits. The point was not* "*discussed by counsel.* The application under con-"sideration is denied, with costs."

And while the Federal courts have generally followed the dictum, it has only been in form.

Seymour v. White County, 92 Fed. 115.

In this case it was said leave should be granted as a "matter of course." See also Franklin Bank v. Taylor, 53 Fed. 865.

In Ricker v. Powell, 100 U. S. 104, the Circuit Court of the United States for the Southern District of Illinois entertained an application for leave to file bill of review in that court notwithstanding its decree had been affirmed in this court. Mr. Chief Justice Waite wrote the opinion and no question was made as to the propriety of the lower court entertaining the application and its refusal to grant leave was approved "without intending to decide

that an appeal will lie to this court from an order of the Circuit Court refusing leave to file a bill of review for newly discovered matter."

But, as we have stated, the rule in equity, as to bills of review, whatever it is, cannot be read into the statute in question as a *proviso*, and the cases relied on by petitioner are not in point.

Counsel for petitioner begins his argument thus: "In discussing the legal questions involved in this case, it is well in the outset to distinguish between the practice in common law cases and that prevailing in equity cases." This rule is a very good one and if it had been observed counsel would have omitted from his brief every *case in this court* which he cites and relies upon, for they are all cases in equity and not one of them involved the construction of statutes governing the granting of new trials at law after term time, such as the statute now before the court. Can it be seriously contended that this court or any appellate court can, in the absence of a statute, any more than a lower court, in actions at law, open its judgments and grant a new trial after term time, or by its consent or leave confer authority on the lower court to do so? If not, then, within the four walls of the statute in question must be found the authority and the sole authority for the trial court to grant a new trial.

The remedy provided by the statute before the court, instead of being in the nature of a bill of *review* in equity, is more akin to an *original* bill in equity to enjoin a judgment at law, as it gives to the lower law courts the same authority to va-

cate their judgments after term time that courts of equity previously exercised. The remedy provided by this statute is a new action, just as an original bill in equity, and is not a review in the same case. This jurisdiction of courts of equity to enjoin the execution of judgments at law is an ancient one (1st Black on Judgments, Sec. 356). And these code provisions giving to courts of law a similar power after the expiration of the term at which the judgment was rendered is simply carrying out the modern policy of simplifying judicial remedies. (§ 836 Pom. Eq. Jur.) Original bills in equity lie on grounds of newly discovered evidence (1st Black on Judgments, Sec. 386). No consent of the trial court, or the appellate court which may have affirmed the decree, is necessary (Brown v. Walker, 84 Fed. 532 and cases cited). It is a new and independent action, just as the remedy provided by the statute in question. This statutory remedy of vacating judgments by new trial supplants the obsolete remedies at common law by *audita querela* (1st Black on Judgments, Sec. 299). And by error, *coram nobis* (Sec. 300 Id.). In equity, where it is sought to enjoin a judgment at law, the party seeking relief must first have exhausted his remedy by appeal in the original action (1st Black on Judgments, Sec. 363). And as an appeal was a prerequisite to a right of relief by original bill in equity, so under the statute the pendency of an appeal can be no obstacle to the granting of the relief under the statute.

In Ex parte Russell, this court very properly

observed, in construing a statute of this kind, that the permission given the trial court to grant a new trial on newly discovered evidence after term did not amount to an *appeal from the decision of this court.* It was said: —

> "It has been objected that the granting of a new trial after a decision by this court is in effect an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us; but it is not. A new case must be made. A case involving fraud or other wrong upon the government. It is analogous to the case of a bill of review in chancery to set aside a former decree or a bill impeaching a decree for fraud. We are of the opinion, therefore, that the court of claims had jurisdiction to grant a new trial notwithstanding the filing of the mandate of this court."

In Belknap v. U. S., 150 U. S. 590, this court, in construing the Court of Claims statute, further held that a new trial might be granted at a term subsequent to that at which the judgment is rendered, if within the two years; and took occasion to point out the difference between new trials after term time under a statute of this kind and an ordinary motion for new trial at same term. The court said: —

> "On the 2d of June, 1884, the Court of Claims sustained the motion, and granted a new trial. Of this appellant complains. As the new trial was granted at a term subsequent to that at which the original judgment was rendered (the terms of the Court of Claims beginning on the first Monday in

December in each year, Rev. Stat. § 1052), there would ordinarily be no power in the court to grant such new trial. Coughlin *v.* District of Columbia, 106 U. S. 7; Brooks *v.* Railroad Company, 102 U. S. 107. But there is in the Revised Statutes a peculiar provision, applicable only to the Court of Claims, which is as follows: —

"'Sec. 1088. The Court of Claims, at any time while any claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, may, on motion on behalf of the United States, grant a new trial and stay the payment of any judgment therein, upon such evidence, cumulative or otherwise, as shall satisfy the court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law.'"

"*In order to give full effect to this statute the Court of Claims must have power to grant a new trial at a term subsequent to that at which the judgment was rendered, for it explicitly provides that it may be exercised at any time within two years.*"

So, we say in the case at bar, in order to give full effect to the statute in question the trial court must have power to grant a new trial notwithstanding its former judgment or the affirmance thereof for it explicitly provides that a new trial may be granted at any time within three years after final judgment. There is no exception express or implied as to cases appealed or judgments affirmed just as there was no limitation in the Court of Claims Act, limiting mo-

tions to the term. The writ of error in the case at bar had to be taken much within the limits provided for granting a new trial. No reasons are apparent why an *affirmed* judgment should have any higher sanctity as against a *new trial* on *newly discovered evidence*, discovered after the term than any other judgment. An affirmed judgment on the case made and the record becomes a *judicial verity* just the same as a judgment unappealed from and neither should prevent *a new trial on new evidence* when expressly provided for by statute. It will be borne in mind that the judgment of the trial court in this case really stood *ex proprio vigore* — this court having been equally divided.

In Durant v. Essex Co., 7 Wall. 112, it was held: —

> "In cases of appeal or writ of error in this court the appellant or plaintiff in error is always the moving party. It is affirmative action which he asks. The question presented is, shall the judgment or decree be reversed? If the judges are divided, the reversal cannot be had, for no order can be made. *The judgment of the court below, therefore, stands in full force.* It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity *with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.*"

The court further held that where judgments are

affirmed in this manner the decision is no authority in other cases of like character.

In U. S. v. Young, 94 U. S. 258, it is held that when the Court of Claims grants a new trial under the act of Congress in question, and while an appeal therefrom is pending in this Court, the judgment is vacated and the Court of Claims resumes control of the case and the parties. This Court said: —

> "The Court of Claims, by granting a new trial, has resumed control of the case and the parties. This it had the right to do. Such a power may be somewhat anomalous, but it is expressly given, and every person when he submits himself to the jurisdiction of that court for the prosecution of his claim submits himself to its operation. The proceedings under which the new trial was obtained are now a part of the record below, and after judgment is finally rendered may be brought here by appeal for review."

If the lower court erred in granting a new trial it can be reviewed on appeal here, but it cannot control the lower court's action in the first instance by prohibition or mandamus.

The counsel for petitioner fear that when this Court has read the return of this respondent, it will agree with him that,

> "The original judgment in the Orange Fuller case was also a great injustice and wrongfully obtained and had the actual truth been fully known and not purposely concealed that the judgment in the Orange Fuller case would not have been affirmed by the United States Circuit Court of Appeals for the Eighth Circuit

or this Honorable Court, and * * * that a greater injustice and wrong would be done by permitting the plaintiffs in this said Orange Fuller case to recover when the truth had been suppressed, and when all other plaintiffs were prevented from recovering because of the fact that the whole truth had come to light,"

and be satisfied that the respondent, as Judge of the said United States District Court acted in good faith, as stated by him in his return, and had,

"At no time been disposed to disregard the mandate of this Honorable Court in this Orange Fuller case, but by reason of the great hardships of the judgment in the said Orange-Fuller case, and by the peculiar statute extended over the Indian Territory covering the procedure in this case, which in fact is really not a motion for a new trial, but an independent statutory action, unlike the statutes prevailing in any other jurisdiction of the United States save in the District of Columbia relating to the court of claims * * * where it has been held that notwithstanding an appeal to a higher court, or a mandate from a higher court that new trials must be granted in such cases as the one at bar, your respondent felt constrained without intending any discourtesy to this Honorable Court or any disregard or discourtesy to its mandate to enter the order complained of in this case, and which order your respondent is perfectly willing to set aside should it seem meet and proper to this Honorable Court that such should be done,"

and that an injustice was sought to be accomplished by the writ of mandamus prayed for in this petition

and would, if it held that the new trial had been improperly granted, now enter an order such as entered in the case of In re Potts, 166 U. S. 63, wherein it stated: —

> "Upon the record as it stands, a clear case is shown for issuing a writ of mandamus to set aside those orders, and to execute the mandate according to what appears to this court to be its manifest meaning and effect.
>
> "Upon the question whether an application for leave to file petition for a rehearing in the Circuit Court could and should be entertained by this court at the present stage of the case, no opinion is expressed, because no such application has been made.
>
> "Unless such an application shall be made to this court within twenty days, and shall upon consideration be granted by this court, an order will be entered that the writ of mandamus issue as prayed for."

In view of this language in this last mentioned opinion of this Court the counsel for petitioner argue that it is now too late for a petition for a new trial to be filed because the three-year period, fixed by the statute above referred to and extended over the Indian Territory, by Act of Congress, has lapsed, but counsel overlook the fact that there is a wide distinction between the filing of a petition for a new trial and the granting of such petition. The petition was filed within the time prescribed by the statute. There is no time limitation upon this court as to its power to now grant the respondent the privilege to grant a new trial. (In re Gamewell Fire Alarm Tel. Co., 73 Fed. 911.)

If this Court's permission is requisite to the granting of a new trial notwithstanding the statute, then no time limitations in the statute would seem to control its discretion.

Even though this Court should hold that the defendant could not *file* its petition for a new trial without this Court's permission, the time for filing as fixed by the statute has not lapsed. When this statute of Arkansas was made a part of the statutes of the United States in force in the Indian Territory this Court had already laid down a rule of construction as to when the period of time would expire for filing the petition for new trial under such statutes.

In the case of Ex parte Russell this Court held that the two years fixed by a similar Federal statute covering the Court of Claims did not begin to run until the case had been passed upon by the United States Supreme Court and it is not to be assumed that the opinion of this Court will now yield to an opinion of the Supreme Court of Arkansas as to the construction of a like statute as such course would result in conflicting constructions by this Court of similar acts of Congress. Besides, by the same act of Congress there was extended over the Territory of Oklahoma, that section of the statutes of Nebraska hereinabove referred to granting to trial courts the right to entertain petitions for new trials after term time. And we have shown that the courts of Nebraska hold that such new trials may be granted notwithstanding the affirmance of the former judgments by the appellate courts. It would certainly be an anomalous

condition should one rule of construction apply in cases coming to this Court from Oklahoma and an exactly opposite rule to those cases coming from the Indian Territory. It would also violate the rule laid down by this Court in the case of Burgess v. Seligman, 107 U. S. 20, in which it was held that ordinarily this Court will follow the construction of State statutes by State courts where such constructions of the State courts have been made previous to the question of the constructions of such statutes being raised in this Court, but that where this Court or one of the lower Federal courts, had already construed the statute prior to construction of same by the State court, then such construction by this Court or some lower Federal court must prevail as against the different construction on the part of the State court. The construction of this statute in the case of Jacks v. Adair, *supra*, by the Supreme Court of Arkansas was subsequent in time to the construction of a similar statute by this Court in the case of Ex parte Russell, *supra*.

The motion for new trial having been filed within the time provided by the Act of Congress, no consideration of justice would seem to require this Court to now withhold its consent to the lower court to now pass upon it, if such consent is or was necessary.

The defendant in the judgment which is sought to be enforced by the writ of mandamus prayed for in this petition acted in good faith with the light it had before it in filing the petition for new trial, and it is

respectfully submitted that such action was proper in view of the statute above referred to in force in the Indian Territory, and in view of the opinions of this Court and the opinions of the State courts hereinabove referred to construing like statutes. It is confidently believed that this Court will hold that this is not a proper case for a writ of mandamus as prayed for but will hold that the rule laid down by this Court in the case of Ex parte Russell, *supra*, as well as the later cases of Belknap v. U. S., 150 U. S. 590, and U. S. v. Young, 94 U. S. 258, and in the case of Ex parte United States, *supra*, apply and control.

If, however, in the opinion of this Court, the rule as laid down in the case of In re Potts and other cases to the effect that applications for leave to file or hear a bill of review must have been made to this Court, and such leave granted applies in this case, then this Court is asked to hold that the period of time within which such petition must be filed in the lower court only commences to run at the time fixed by this Court in its opinion in the case In re Russell, *supra*, which is the determination of the case on writ of error in this Court, and not at the time of the rendering of the original judgment in the trial court as indicated by a contrary rule in the case of Adair v. Jacks, *supra*, and it is further asked to enter an order in this case similar to the one In re Potts, *supra*, so that the judgment defendants in this Orange Fuller case may be permitted to now make application for leave to file

petition for such new trial, and if this Court should hold that it is now too late to file a new petition for a new trial, it is then asked, under the peculiar circumstances of this case, and where the good faith of the United States District Court is so fully shown, as well as the injustice that will be occasioned should a writ of mandamus of this Court now issue, to grant leave to the trial court to now proceed to hear and determine the petition for new trial which was filed in such court within the said three-year period of time as if it had never been heard, so that injustice may not be done as is sought to be done by the petitioner in this proceeding.

The rule in equity with reference to granting leave to file a bill of review has never been applied so as to work an injustice. This Court has not only granted to parties leave to file bills of review, but on application of the lower courts themselves have granted to such courts the right to pass on bills previously filed without leave. *In re Potts*, leave was given the parties to file an application in this court, yet in the course of the opinion it is said: —

> "When the merits of the case have been once decided by this Court on appeal the Circuit Court has no authority, without express leave of this Court, to grant a new trial, a rehearing or a review."

In Romer v. Simon, 91 U. S. 149, Mr. Justice Waite said it was proper practice for the parties to

make an application in the court below, "and have that court send to us a request for the return of the record in order that it might proceed further with the cause. Should such a request be made we might, in a proper case and under proper restrictions, make the necessary order." So that if we are wrong in the proposition that no consent of this Court is necessary to the lower court entertaining a petition for a new trial under the statute in question, yet the petition having been filed within the time prescribed by the statute there is no reason why this Court cannot now grant the respondent the right to entertain and pass on said petition for a new trial and prevent the accomplishment of a judicial wrong. We earnestly contend, however, in conclusion, that no such procedure is or was necessary. We have shown that wherever statutes of this kind exist, — in Kansas, Ohio, Indiana, Kentucky, Iowa, Nebraska, New York, California, Wisconsin and Arkansas, — they have been uniformly construed as giving to the parties the right to file the petition in the lower court without leave from the appellate court which may have affirmed the judgment, and that such petitions are not considered as a review in the original case in virtue of the court's original jurisdiction, but as the institution of a new suit, requiring the service of summons, the bringing in of the parties as in other causes, the filing of pleadings and a hearing in the exercise of a new jurisdiction conferred by statute. And all of these State decisions are in exact harmony with this

Court's decisions construing a similar Federal law governing the granting of new trials in the Court of Claims.

It is not to be doubted that the public is interested in a righteous end being put to litigation and that the final judgments and decrees of courts are sacred from attack and are even beyond the reach of the legislature, but the power of the legislature to confer on the courts themselves jurisdiction to open their proceedings and vacate their judgments and decrees has never been questioned. And when such jurisdiction is conferred in plain and unambiguous terms, the courts have never declined the power as an unconstitutional grant or evaded it by a resort to an unwarranted construction. No court of justice can exercise a higher function than setting aside an unjust judgment. Courts of equity assumed this jurisdiction without legislative sanction.

Respectfully submitted,

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JOSEPH M. BRYSON,
Attorneys for Respondent.

Supreme Court of the United States.

No. 7, Original.—October Term, 1900.

Ex parte Orange Fuller, Assignee of Manny G. Butler and Robert E. Butler, composing the firm of Butler Brothers, Petitioner. } Application for mandamus.

[May 27th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

Orange Fuller, assignee of Butler Brothers, brought an action on the 23d day of January 1892 in the United States Court in the Indian Territory against the Missouri, Kansas and Texas Railway Company to recover the damages alleged to have been sustained in consequence of the negligence of t[illegible]fendant resulting in the destruction of certain property of Butler Brothers by fire.

On the 1st day of May 1894 the venue of the case was changed to the second judicial division of the Territory, now the Central District, and the result of a trial before the court and a jury was a verdict and judgment in favor of the plaintiff for $8,500.

The judgment was superseded, and the cause was taken to the United States Circuit Court of Appeals for the Eighth Circuit, where the record was filed April 3d 1895. In that court the judgment was affirmed on the 30th day of December 1895. 72 *Fed. Rep.* 467.

The judgment of affirmance was superseded, and the case was brought to this court upon writ of error sued out by the railway company, the transcript of record being filed here on March 10th 1896. In this court the judgment of the Circuit Court of Appeals was affirmed January 3d 1898. 168 *U. S.* 707. Our mandate was issued March 3d 1898, and filed in the United States Court in the Indian Territory on July 22d 1898.

On the 20th day of April 1896, while the case was pending in this court, the railway company filed in the United States Court in the Indian Territory a petition for rehearing upon the ground of newly discovered evidence. Subsequently, at different dates, amended petitions were filed by the company for a new trial. To those amended petitions answers were made, and it was objected that the court was without jurisdiction or authority to grant a new trial, and that it could not consider the alleged newly-discovered evidence.

On the 15th of January 1900, after the filing in the court of original jurisdiction of the mandate of this court, Judge Clayton of that court

granted the application of the railway company and made an order for a new trial.

It should be here stated that in that court there were other cases of a like character with the present case—all growing out of the fire on account of which the present action was brought. One of those cases was *Missouri, Kansas & Texas Railway Company* v. *Wilder.* In that case the United States Court of Appeals for the Indian Territory adjudged that the plaintiff was not entitled to recover. 53 *S. W. Rep.* 490.

In the order granting a new trial in the present case it was stated: "Now at this day comes the above named defendant, and in support of the fourth amended petition for a new trial in this case files certified copy of opinion of the United States Court of Appeals for the Indian Territory, in the case of *Missouri, Kansas & Texas Railway Company, Appellant,* v. *William L. Wilder, Appellee,* and the court having fully considered the said amended petition for a new trial in this case, which was heretofore continued by agreement between counsel to this the December 1899 term of this court, together with the evidence thereon, and the briefs of counsel filed both in support of and in opposition to said amended petition for new trial, and the court having been fully advised in the premises finds that the original petition for new trial was filed on the twentieth day of April 1896, in accordance with section 5155 of Mansfield's Digest of the Statutes of Arkansas, extended over the Indian Territory by act of Congress, May 2d 1890, and that summons was duly issued and served upon the plaintiff as required by said statute, and that the said plaintiff has duly entered his appearance in these proceedings, and filed answer to the original petition for new trial, as well as to the different amendments thereto, as such amendments have been based upon such additional evidence as the defendant alleges was discovered subsequent to the filing of the original petition for new trial and amended petitions for new trial respectively, and the court further finds that the evidence fully sustains the said petition for new trial and that under the statute hereinbefore referred to, and in view of the opinion of the United States Court of Appeals for the Indian Territory in the case of the *Missouri, Kansas & Texas Railway Company, Appellant,* v. *William L. Wilder, Appellee,* a companion case to this, that said petition should be sustained. Wherefore the court orders that the said petition be sustained and a new trial be granted."

After setting out the above, the return made by Judge Clayton to the rule herein continued: "Respondent would respectfully further show that it appeared upon the hearing of the petition for new trial in the Orange Fuller case that the defendant railway company had used all possible diligence to discover the actual origin of the fire upon which that suit was founded prior to the time of the trial of that case, and that it was to a large extent prevented from so doing by the strong influence which plain-

tiffs in said case exerted over the minds of the people in the community where the fire occurred, and also by the actions of one of the plaintiffs who it was shown urged several of the witnesses to conceal what information they had with reference to the origin of the fire, and that after the trial of the Orange Fuller case in the District Court the said railway company continued its efforts to discover the real origin of the fire, and as a result of its efforts it produced reliable new witnesses who proved by newly discovered and strong circumstantial evidence that the fire was set out through accident by one Dole Baugh, and also proved by the admission of the said Dole Baugh, made while the fire was burning, that he had so set it out, and it was this evidence which largely induced the United States Court of Appeals for the Indian Territory to render their opinion of reversal heretofore cited in the said Wilder case as well as induced the plaintiffs in the companion cases to dismiss their cases, and that not only the judges of the District Court and the United States Court of Appeals for the Indian Territory, but the plaintiffs in the above suits, became satisfied that these suits were all matters of great injustice and wrong, and satisfied this respondent that the original judgment in the Orange Fuller case was also a great injustice and wrongfully obtained and had the actual truth been fully known and not purposely concealed that the judgment in the Orange Fuller case would not have been affirmed by the United States Circuit Court of Appeals for the Eighth Circuit or this honorable court, and your respondent further realized that a greater injustice and wrong would be done by permitting the plaintiffs in this said Orange Fuller case to recover when the truth had been suppressed, and when all other plaintiffs were prevented from recovering because of the fact that the whole truth had come to light."

The present proceeding is an application for leave to file a petition for a mandamus commanding the judge of the United States Court in the Indian Territory to set aside the above order of January 15th 1900 granting a new trial, and to execute the mandate of this court.

The question presented is whether the court of original jurisdiction had authority upon newly discovered evidence to grant to the railway company a new trial after the final decision in this court.

By the act of Congress of May 2d 1890, providing a temporary government for the Territory of Oklahoma and enlarging the jurisdiction of the United States Court in the Indian Territory and for other purposes, it was declared:

"§ 31. That certain general laws of the State of Arkansas in force at the close of the session of the general assembly of that State of 1883, as published in 1884 in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this

act or with any law of Congress, relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide, that is to say, the provisions of the said general statutes of Arkansas relating . . to pleadings and practice, chapter 119." 26 *Stat.* 81, 94, *c.* 182.

In Mansfield's Digest of the Statutes of Arkansas, *c.* 119, will be found the following sections under the head of Pleadings and Practice:

"§ 5151. A new trial is a re-examination in the same court of an issue of fact after a verdict by a jury or a decision by the court. The former verdict or decision may be vacated and a new trial granted, on the application of the party aggrieved, for any of the following causes, affecting materially the substantial rights of such party: . . *Second.* Misconduct of the jury or prevailing party. . . *Seventh.* Newly discovered evidence, material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial."

"§ 5153. The application for a new trial must be made at the term the verdict or decision is rendered, and, except for the cause mentioned in subdivision 7 of section 5151, shall be within three days after the verdict or decision was rendered, unless unavoidably prevented.

"§ 5154. The application must be made by motion, upon written grounds, filed at the time of making the motion. The grounds mentioned in the second, third and seventh subdivisions of section 5151 must be sustained by affidavits showing their truth, and may be controverted by affidavits.

"§ 5155. Where grounds for new trial are discovered after the term at which the verdict or decision was rendered, the application may be made by petition filed with the clerk not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the court. The evidence may either be by depositions or by witnesses examined in court. But no such application shall be made more than three years after the final judgment was rendered."

Many of the cases cited by the petitioner have no application to the present proceeding. They relate to suits in equity and to the power of the court of original jurisdiction in an equity suit to prevent or stay the execution of the mandate of an appellate court. There can be no doubt as to what is the rule recognized in cases of that kind in the courts of the United States or in courts established by its authority.

In *Southard* v. *Russell*, 16 *How.* 547, 571, it was said: "Nor will a bill of review lie in the case of newly discovered evidence after the publication, or decree below, where a decision has taken place on an appeal, unless the

right is reserved in the decree of the appellate court, or permission be given on an application to that court directly for the purpose. This appears to be the practice of the Court of Chancery and House of Lords, in England, and we think it founded in principles essential to the proper administration of the law, and to a reasonable termination of litigation between the parties in chancery suits." So in *United States* v. *Knight*, 1 *Black*, 488, 489: "The defeated party, upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in the court below to review the judgment which this court had rendered." In *Sanford Fork & Tool Co., Petitioner*, 160 *U. S.* 247, 255, the court said: "When a case has been once decided by this court on appeal, and remanded to the Circuit Court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The Circuit Court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it further than to settle so much as has been remanded. *Sibbald* v. *United States*, 12 *Pet.* 488, 492; *Texas & Pacific Railway* v. *Anderson*, 149 *U. S.* 237. If the Circuit Court mistakes or misconstrues the decree of this court, and does not give full effect to the mandate, its action may be controlled, either upon a new appeal (if involving a sufficient amount) or by a writ of mandamus to execute the mandate of this court." See also *In re Potts, Petitioner*, 166 *U. S.* 263, 267–8.

The action against the railway company was one at law, and whether the court in the Indian Territory had authority to grant the new trial of which complaint is made depends upon the Arkansas statute which, by the act of Congress, was made a law of the Indian Territory. Sections 5153 and 5154 evidently refer to the ordinary motion or application for a new trial made during the term at which the verdict of the jury or the decision of the court is rendered. Section 5155 relates to new trials for grounds disclosed after the term, and requires such grounds to be set forth in a petition, summons upon which shall issue against the adverse party. A proceeding under that section is, in form, a new, independent suit, although the statute requires the application to be summarily decided by the court.

These statutory provisions apply to actions at law, not suits in equity. This view is supported by the decision of the Supreme Court of Arkansas in *Jacks* v. *Adair*, 33 *Ark.* 161, 167, (1878). Referring to the statute giving authority to grant a new trial after the term upon the ground of newly discovered evidence, that court said: "The correct view of the statute in question seems to be this: that it extends to cases at law a new remedy, without taking away any which existed in equity, but as to the latter being cumulative, where any difference might exist. It is noticeable that the word 'decrees' is not used, which is the apt and ordinary designa-

tion of final orders in equity; and there are other indications in the language and context of the provisions in question, that they were primarily intended for cases at law, and for new trials of facts found by a jury, or a court sitting as such."*

We perceive no reason to doubt that the action of the court of original jurisdiction was justified by the statute. So that the only question remaining is whether it was competent for Congress to confer upon such court, established under the authority of the United States, the power to grant a new trial in an action at law upon grounds discovered after the expiration of the term at which the verdict or decision was rendered. Some light is thrown upon this question by the cases in this and in other courts.

Ex parte Russell, 13 *Wall.* 664, 668, was an action in the Court of Claims to recover compensation for the seizure and use by the United States military authorities of certain steamers belonging to the claimant. The case involved the construction and effect of the second section of the act of June 25th 1868, which provided that the Court of Claims, "at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the final disposition of any suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim, and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law." In the Court of Claims an application for a new trial was made by the United States when the case was pending in this court. The former court dismissed the application for want of jurisdiction, on the ground, in part, that after it was made the mandate of this court affirming the original judgment against the United States was filed in the Court of Claims. From that order an appeal was allowed to this court, and one of the questions presented was whether the Court of Claims should have dismissed the application for a new trial for want of jurisdiction. This court observed that the Court of Claims erred in dismissing the application, and after referring to the causes which probably induced the passage of the act of June 25th 1868, said: "But whatever reasons Congress may have had for passing the act, of its right to pass it there is no question. The erection of the Court of Claims itself, and the giving to parties the privilege of suing the Government therein, though dictated by a sense of justice and good faith, was purely voluntary on the part of Congress; and it has the right to impose such conditions and regulations in reference to the proceed-

* That case was based upon sections 4688, 4690, 4691 and 4692, Gantt's Digest, (1874) which are the same as the above sections in Mansfield's Digest.

ings in that court as it sees fit. The section in question was undoubtedly intended to give the Government an advantage, which, in respect to its form, is quite unusual, if not unprecedented, but which Congress undoubtedly saw sufficient reason to give. It authorizes the Court of Claims, on behalf of the United States, at any time while a suit is pending before, or on appeal from, said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evidence as shall satisfy the court that the Government has been defrauded or wronged. . . It has been objected that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us. But it is not. A new case must be made; a case involving fraud or other wrong practised upon the Government. It is analogous to the case of a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud. We are of opinion, therefore, that the Court of Claims had jurisdiction to grant a new trial, notwithstanding the filing of the mandate of this court." Chief Justice Chase and Mr. Justice Clifford dissented from the opinion because, in their judgment, "the act of Congress did not warrant the granting of a new trial on a petition filed subsequent to an appeal and the return of the mandate of this court." In *Ex parte United States*, 16 *Wall.* 699, 703, the above case was again before this court, and a peremptory mandamus was awarded requiring the Court of Claims to hear and determine the application for a new trial.

In *United States* v. *Young*, 94 *U. S.* 258, 260, it appeared that a new trial was granted by the Court of Claims, in a suit at law, while an appeal was pending here from the original judgment. This court said: "The Court of Claims, by granting a new trial, has resumed control of the case and the parties. This it had the right to do. Such a power may be somewhat anomalous, but it is expressly given, and every person when he submits himself to the jurisdiction of that court for the prosecution of his claim submits himself to its operation. The proceedings under which the new trial was obtained are now a part of the record below, and after judgment is finally rendered may be brought here by appeal for review."

In *Belknap* v. *United States*, 150 *U. S.* 588, 590, 591, the court observed that while ordinarily the Court of Claims would be without power to grant a new trial at a term subsequent to that at which the original judgment was rendered, it had such power under section 1088 of the Revised Statutes—which is the same in substance as the second section of the above act of June 25th 1868. The court said: "In order to give full effect to this statute the Court of Claims must have power to grant a new trial at a term subsequent to that at which the judgment was rendered, for it explicitly provides that it may be exercised at any time within two years."

In Iowa there is a statute giving the court power to grant a new trial on grounds discovered after a verdict or decision is rendered—the petition for the new trial to be filed not later than one year after final judgment, and the case made by it tried as other cases. In *Cook* v. *Smith*, 58 *Ia.* 607, 608, the Supreme Court of that State said: "The right to apply for, and the power of the court to entertain, jurisdiction of the application during the time limited in the statute are absolute and unconditional. There is no such inconsistency between the two proceedings as to require the one to be abated because the other is pending. It may be both should not be actively prosecuted at the same time, for the determination of one may render a decision in the other unnecessary. Upon application this would no doubt be controlled by the courts. Suppose the ground upon which a new trial was asked was not discovered until after the appeal was taken, on the last day allowed therefor, would such appeal deprive the court of the power to entertain jurisdiction of a petition for a new trial? Clearly not, we think, for during the time limited in the statute the power of the court and the right of the party is unconditional. There are cases where neither party is satisfied with the judgment below. Would an appeal by one party oust the court of the power to entertain and grant a new trial on the application of the other party? We think not."

In a case arising under a statute similar to the one in Arkansas, the Supreme Court of California said: "The appeal from the judgment did not divest the trial court of jurisdiction to hear and determine the motion for a new trial." *Naglee* v. *Spencer*, 60 *Cal.* 10. In *Rayner* v. *Jones*, 90 *Cal.* 78, 81, the same court said: "A notice of motion for a new trial was served and filed in due season, and upon the hearing of the motion the trial court dismissed it, upon the theory, evidently, that as the judgment made and entered had been appealed from when the motion for a new trial came on for hearing, the court below had lost jurisdiction to determine it. This view of the matter is untenable, and the court should have heard the motion, and either granted or denied it, upon the bill of exceptions presented, which is a part of the record here on the appeal from the order of dismissal." See also *Carpentier* v. *Williamson*, 25 *Cal.* 154, 167; *McDonald* v. *McConkey*, 57 *Cal.* 325; *Chase* v. *Evoy*, 58 *Cal.* 348; *Scott* v. *Scott's Ex'x*, 82 *Ky.* 328; *Duffitt* v. *Crozier*, 30 *Kans.* 150; *Hines* v. *Driver*, 89 *Ind.* 339; *Railroad Co.* v. *O'Donnell*, 24 *Neb.* 753.

The same principles have been recognized in criminal cases. In *State ex rel. Turner* v. *Circuit Court for Ozaukee County*, 71 *Wis.* 595, which was a criminal case, an application was made for a new trial after the affirmance of the original judgment. In that State it was provided by statute that "the Circuit Court may at the term in which the trial of any indictment or information shall be had, or within one year thereafter, and in either case before or after judgment, on the petition or motion in

writing of the defendant, grant a new trial for any cause for which, by law, a new trial may be granted, or when it shall appear to the court that justice has not been done, and on such terms as the court may direct." The Supreme Court of Wisconsin said: "It appears that a proper motion was made within one year from the judgment, upon the grounds addressed to the discretion of the Circuit Court, and a new trial was undoubtedly granted under the special authority conferred by the above statute; and the question now is, Had the court power to grant it? We can only consider the question of the power or jurisdiction of the court in the matter, not whether it exercised that power wisely or granted the motion on insufficient grounds, for the court may have erred, but error does not affect its jurisdiction. This statute was probably borrowed from Massachusetts. *See Pub. Stat. Mass.* 1882, *c.* 114, § 128; *Com'th* v. *Peck*, 1 *Metc.* 428; *Com'th* v. *McElhaney*, 111 *Mass.* 439; *Com'th* v. *Scott*, 123 *Mass.* 418. Also *Terr. Stat. Wis.* 1839, *p.* 377, § 6; *Rev. Stat.* 1849, *c.* 149, § 6; *Rev. Stat.* 1858, *c.* 180, § 6. We do not well see upon what grounds the power of the court to grant the new trial can be denied if the provision is valid. The fact that the judgment has been affirmed by this court furnishes no sufficient reason for denying that power. It is said by the affirmance of the judgment it became a finality, a final determination of the cause and sentence of the law. That view would certainly be correct had not the legislature conferred this special authority to grant a new trial upon a proper cause shown. On affirmance of a judgment in a civil case no new trial could be granted unless the statute authorized it. Only where the statute does authorize it can a new trial after affirmance be granted, either in a civil or criminal cause. In actions of ejectment the Circuit Court can grant a new trial even after affirmance by this court, and this by virtue of a statute upon the subject. *Haseltine* v. *Simpson*, 61 *Wis.* 427. Consequently we can perceive no sufficient grounds or reasons for denying the validity of the statute to grant a new trial after judgment has been affirmed in this court, any more in a criminal than in a civil cause."

In *Commonwealth* v. *McElhaney*, 11 *Mass.* 439, 441, 443, which was an indictment for murder, an application was made by petition for a new trial on the ground of newly discovered evidence. The question was raised by the Commonwealth whether the application could be entertained after the accused had been sentenced to death and the executive warrant for execution thereof issued. The question depended upon section 7 of the General Statutes of Massachusetts, *c.* 173, providing that "the Supreme Judicial Court and Superior Court may, at the term in which the trial of any indictment is had, or within one year thereafter, on the petition or motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not

been done, and on such terms or conditions as the court shall direct." The Supreme Judicial Court of Massachusetts said: "At the time of the passage of the General Statutes, therefore, this court had no original criminal jurisdiction, except of capital cases; and in these cases sentence has always been passed within a very short time after the trial and conviction, and a copy of the record of the conviction and sentence forthwith transmitted to the Governor in accordance with the Revised Statutes, c. 139, § 11, and the General Statutes, c. 174, § 24; and yet the General Statutes, c. 173, § 7, in terms authorize a petition for a new trial to be presented to this court at any time within one year after the trial. The unavoidable conclusion is that so long as that year has not elapsed, and the sentence has not been carried into execution, the court is authorized to entertain a petition for a new trial."

In no one of the above cases, nor indeed in any case to which our attention has been called, was there any suggestion of the want of power in the legislature to authorize the granting of a new trial in an action at law upon evidence discovered after the term at which the verdict or decision was rendered. So far as the power of Congress is concerned, we cannot conceive that legislation of that character in respect of cases at law, as distinguished from cases in equity, infringes upon any right secured by the Constitution of the United States.

In the case now before us it appears that the operation of the original judgment was suspended by a supersedeas. But the statute, reasonably construed, does not declare that the right to apply for a new trial upon newly discovered evidence after the term shall be any the less when the original judgment is superseded. Nor does it declare that a new trial of an action at law shall not be applied for or granted while the case is pending in the appellate court. It is true that, in the absence of legislation to the contrary, neither the filing of a petition for new trial nor the granting of a new trial by the court of original jurisdiction, after the term and upon newly discovered evidence, interferes with the power of the appellate court to proceed with the hearing and determination of the case upon the record before it. But the operation and effect of its final judgment may be ultimately controlled by the disposition made by the court of original jurisdiction of an application for a new trial made in conformity with a statute. If this be regarded as an anomalous rule of procedure in actions at law, it is sufficient to say that Congress, in its wisdom and in order to promote the ends of justice, saw proper to prescribe it, and we know of no reason to question the authority it has exercised upon this subject. All embarrassment in the present case was avoided by the fact that the new trial of which petitioner complains was not granted while the original case was in this court nor until after our mandate had been filed in the court of original jurisdiction.

Our conclusions are: 1. That the statute of Arkansas in question, which was made by Congress the law of the Indian Territory, is to be held applicable only to actions and proceedings at law in the courts of that Territory, as distinguished from suits or proceedings in equity; 2. That an application under that statute, within the time prescribed, for a new trial in an action at law, upon grounds discovered after the term at which the verdict or decision was rendered, was a matter of right, and did not require the leave of any court—the application constituting, on appeal, a new action, in which summons or process would regularly issue against the adverse party, and which must be heard and determined by the court upon evidence adduced by the parties.

It results that the court of original jurisdiction acted within the authority conferred upon it, and the rule for a mandamus compelling it to set aside the order granting a new trial must be discharged.

It is so ordered.

True copy.

Test:

Clerk Supreme Court, U. S.